No. 256

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# In the
# Supreme Court of the United States.

OCTOBER TERM, 1957.

J. THOMAS MILEY,
*Petitioner,*

*v.*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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# In the
# Supreme Court of the United States.

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OCTOBER TERM, 1957.

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J. THOMAS MILEY, *Petitioner*,

*v.*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON MUTUAL LIFE INSURANCE COMPANY, COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, LOYAL PROTECTIVE LIFE INSURANCE COMPANY, MONARCH LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PAUL REVERE LIFE INSURANCE COMPANY, STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER, CLARENCE W. WYATT, EDWARD A. GREEN, ALAN R. WILLISON, JOHN HILL, THEODORE W. FABISAK, JOSEPH A. HUMPHREYS, JOHN M. DEELY, HORACE GOOCH, JR., and CARL A. SHERIDAN, *Respondents*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

J. THOMAS MILEY prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on April 11, 1957.

## Opinions Below.

The memorandum opinion of the District Court, printed at pages A28-A33 of the Record Appendix, is reported in 148 F. Supp. 299. The one-sentence *per curiam* opinion of the Court of Appeals for the First Circuit, printed at page A36 of the Record Appendix, is reported in 242 F. 2d 758.

## Jurisdiction.

The judgment of the Court of Appeals, printed at page A36 of the Record Appendix, was entered on April 11, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## Questions Presented.

The Court of Appeals affirmed in a one-sentence *per curiam* opinion the holding of the District Court that an action for treble damages for a violation of the Sherman Act in the insurance business may not be maintained in the Federal Courts of Massachusetts. The result of the holding, if followed in the thirty-one states similarly situated, is to deprive persons in two-thirds of the states of any relief whatsoever when injured by a violation of the Sherman Act in the insurance business. The questions presented are:

1. Can persons injured by violations of the Sherman Act in the insurance business be deprived of any relief whatsoever by state statutes which authorize a state commission to purchase insurance for state employees or regulate only some phases of the insurance business but which do not prohibit monopolies and restraints of trade or commerce in the insurance business?

2. Is a complaint under Section 4 of the Clayton Act sufficient if it alleges that an established insurance broker

was injured in his business through the loss of commissions and service fees which he would have received except for a violation of the Sherman Act by the defendants?

3. Are members of a State Commission, acting as state purchasing agents, who, without statutory authority, participate in a combination and conspiracy violative of the Sherman Act, individually liable in an action for treble damages for violation of the Sherman Act?

## Statutes Involved.

The statutory provisions involved are as follows:

Sherman Act, 15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

Clayton Act, 15 U.S.C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

McCarran-Ferguson Act, 15 U.S.C. § 1012:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the

several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

McCarran-Ferguson Act, 15 U.S.C. § 1013:

"(a) * * *

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

The Massachusetts statutes involved, the pertinent provisions of which are printed in Appendix A hereto, may be summarized as follows:

Massachusetts General Laws (Ter. Ed.) c. 93; Section 2:

This section, enacted in 1908, declares void every contract, agreement, arrangement, combination or practice, whereby a monopoly or restraint of competition in "any article or commodity in common use" is created. The section does not specifically apply to the insurance business, as similar statutes in some states do, nor could it be

construed to apply to the insurance business in the light of the settled law at the time it was enacted.

Massachusetts General Laws (Ter. Ed.) c. 32A:

This chapter was enacted to provide a program of group insurance for state employees. It established a special unpaid commission to carry out this purpose and directed the commission to purchase the necessary insurance. It does not, as is required by the McCarran-Ferguson Act, regulate the "business of insurance."

Massachusetts General Laws (Ter. Ed.) c. 176D:

This chapter is the Massachusetts Unfair Trade Practices Act relating to the business of insurance. It defines certain unfair methods of competition and unfair and deceptive trade practices, none of which are here involved; an "omnibus" provision is included in the chapter to cover undefined and unspecified trade practices. The Commissioner of Insurance, (a defendant here) is vested with authority to administer and enforce the Act.

## Statement.

This case presents for the first time in this Court the question of the extent to which states must regulate the business of insurance under the permission granted by the McCarran-Ferguson Act* (Act of March 9, 1945, c. 20, 59 Stat. 33, 15 U.S.C. § 1011 *et seq.*) in order to foreclose Federal jurisdiction of an action for treble damages for a violation of the Sherman Act. If the holding below is followed in states similarly situated, the Sherman Act will not apply to the business of insurance in states which have regulated that business even to the slightest degree de-

*Hereinafter referred to as the McCarran Act.

spite the fact that no Sherman Act type statute protecting the public against unlawful combinations or conspiracies in restraint of trade in the insurance business exists in those states. Plaintiffs in thirty-two states who are injured by violations of the Sherman Act in the insurance industry are left completely without any type of relief; the giant insurance industry, on the other hand, is returned to the privileged status of freedom from the Sherman Act which it was thought to enjoy prior to the *South-Eastern Underwriters* decision[4]; the Congressional intent in enacting the McCarran Act is ignored.

Plaintiff, an established insurance broker, licensed for many years in the States of Massachusetts, Maine and New Hampshire, brought this treble damage action for violation of the Sherman Act against eight insurance companies,[5] four officers of such companies and five individuals, members of the Massachusetts State Employees' Group Insurance Commission (hereinafter called the "Commission"). Jurisdiction of the District Court was invoked under Section 4 of the Clayton Act (15 U.S.C. § 15). The District Court allowed defendants' motions to dismiss on the ground that the complaint fails to state a claim upon which relief may be granted. The allegations of the complaint, which for the purpose of such motions must be accepted as true (*Radovich v. National Football League*, 352 U.S. 445 (1957)), may be summarized as follows:

During 1955 the Massachusetts Legislature enacted chapter 628, Acts of 1955[6] (now General Laws (Ter. Ed.) c. 32A), for the express purpose of providing a program of group insurance coverage for approximately 32,000

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[4] *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

[5] Massachusetts corporations, seven of which were licensed to do business in New York.

[6] Approved August 3, 1955; effective ninety days thereafter.

state employees. The Commission was established and made responsible for the administration of the Act; it was empowered to negotiate for and purchase the insurance policies necessary to carry out the purpose of the Act.

The Commission published and made available to insurance companies and brokers generally "An Invitation to All Insurance Companies Licensed To Do Business in Massachusetts." The invitation contained the specifications of the insurance to be provided and fixed December 1, 1955, as the closing date for bids. Under the specifications three types of bids were allowed: (1) life, accidental death and dismemberment insurance, or (2) hospital, surgical and medical insurance, or (3) a combination of (1) and (2).

Plaintiff, in response to said invitation, prepared and submitted (as permitted under (3) above) a joint bid on behalf of Minnesota Mutual Life Insurance Company* (hereinafter called "Minnesota"), Massachusetts Hospital Service, Inc. (hereinafter called "Blue Cross"), and Massachusetts Medical Service (hereinafter called "Blue Shield"), the latter two being well-known Massachusetts corporations. Eighteen other bids were submitted, among them one submitted by defendant John Hancock Mutual Life Insurance Company (hereinafter called "Hancock"), on behalf of all defendant insurance companies except Boston Mutual Life Insurance Company (hereinafter called "Boston").

Plaintiff's bid on the life, accidental death and dismemberment portion of the insurance, involving coverage of $128,000,000.00 was at a rate of ninety cents ($0.90) per thousand dollars insurance per employee per month. The bid submitted by Hancock on behalf of all defendant in-

*A Minnesota corporation, licensed to do business in Massachusetts, having about seventy-five years' experience in the insurance field and assets of over $200,000,000.00.

surance companies (except Boston) was at a rate of one dollar and twenty cents ($1.20) per thousand dollars insurance per employee per month for the same coverage.

Defendant companies (except Boston) in developing their rate for this portion of the insurance were required by New York law to use rate schedules filed by them in New York; failure to do so would subject them to penalties in New York which in all probability would mean suspension of their licenses to do business in New York. Therefore, their bid of one dollar and twenty cents ($1.20) per thousand dollars of insurance was the lowest bid they could submit. Bidding closed on December 1, 1955. Defendant Commission members immediately informed certain of the other defendants that the $128,000,000.00 insurance coverage on the life, accidental death and dismemberment portion on which plaintiff had submitted the lowest bid should be awarded to plaintiff's principal, Minnesota.

Thereupon defendant Commission members and the individual defendants engaged in a conspiracy to prevent plaintiff's bid from being accepted and to obtain the life, accidental death and dismemberment portion of the insurance for the defendants (except Boston). In furtherance of the conspiracy, they met secretly outside the Commission offices (although the Commission had ample office facilities in the State House) to devise ways and means to carry out the conspiracy. Defendant Commission members realized that the coverage offered by Blue Cross and Blue Shield in plaintiff's bid could not be duplicated elsewhere, so they inquired of a representative of those companies whether the same coverage at the same premium would be offered if defendant companies (except Boston) were awarded the life, accidental death and dismemberment portion of the insurance instead of plaintiff's principal Minnesota. Blue Cross and Blue Shield were willing

to offer the same coverage at the same premium only if defendant companies (except Boston) would quote a rate of ninety cents ($0.90) per thousand dollars insurance per employee per month. Defendant Commission members communicated this information to certain other defendants and a meeting of conspirators was held on a Sunday morning in the offices of defendant Hancock. At the meeting the conspirators discussed methods of eliminating plaintiff's principal, Minnesota, as a competitor and also the division of the business if the conspiracy succeeded. The conspirators finally agreed that defendant State Mutual Life Assurance Company of Worcester (hereinafter called "State") would submit a new bid of ninety cents ($0.90) even though State would thereby violate New York law and risk suspension of its license to do business in New York. In accordance with this plan, State arranged with defendant Commission members to submit the new bid, and did so, but, after a conference with the New York State Insurance Commissioner, State withdrew its bid.

When the conspiracy was thwarted by State's withdrawal of its bid, defendants, including the Commission members, devised a new scheme to accomplish their conspiracy of preventing the contract from being awarded to plaintiff. Defendant Boston, which had never written any casualty or group life insurance and consequently had not filed any group life insurance rate schedules in New York State (a fact known to all defendants), was brought into the conspiracy. As consideration for Boston's joining the conspiracy, defendant Hancock agreed to loan to Boston the trained employees needed by Boston to set up a department to carry out the work involved when the contract was obtained from the Commission. Boston as its part of the conspiracy agreed that, after the contract was executed with the Commission, 95 per cent of the total amount of insurance covered by the contract would be allotted to the

other defendant insurance companies by way of reinsurance. Pursuant to the conspiracy the contract was awarded to defendant Boston, which in turn gave 95 per cent of the business under the contract to the other corporate defendants.

As a result of this illegal conspiracy among the defendants, commerce was restrained, free competition was eliminated and competitive bidding was discouraged; plaintiff, the victim of the conspiracy, was deprived of the commissions and service fees he would have obtained on the contract and the commissions and service fees he would have obtained on new business which Minnesota could reasonably expect to obtain in Massachusetts and other states as a result of having this sizable contract with the State of Massachusetts.*

The District Court allowed defendants' motions to dismiss the complaint. The Court in its opinion assumed that what was done here by the defendants was a "conspiracy or combination violative of the Sherman Act" (A30), but held that plaintiff was without a remedy in the Federal Courts because "it was nevertheless done in the course of negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided [in the McCarran Act] that the Sherman Act shall not apply" (A30). The Massachusetts statute upon which the Court primarily relied (Mass. Gen. Laws (Ter. Ed.) c. 32A) does not purport to regulate "the business of insurance" as is required by the McCarran Act; its sole purpose, as is specifically provided in Section 1 of the

*50 per cent of the premiums for the insurance was to be paid by the 32,000 state employees and 50 per cent by the state; any dividends or other refunds or rate credits were payable solely to the state (Mass. Gen. Laws (Ter. Ed.) c. 32A, Sections 8 and 9). Therefore, as a result of the conspiracy, the state employees and all taxpayers of the state were deprived of the benefits of free competitive bidding, and future competitive bidding by insurance companies, other than Massachusetts companies, was discouraged.

statute (Appendix A, p. 35), is to provide a program of insurance for certain state employees and their dependents. The statute does nothing more than authorize the Commission to act as a purchasing agent to procure the insurance.

As an additional ground for holding that plaintiff has no remedy under the Sherman Act because of state regulation, the Court relied on Massachusetts General Laws (Ter. Ed.) c. 176D* (Appendix A, pp. 42-45). This chapter is the Massachusetts Unfair Practices Act covering the insurance business; it does not declare illegal, as the Sherman Act does, every contract, combination or conspiracy in restraint of trade; it simply defines eight unfair methods of competition and unfair and deceptive acts or practices, and provides that other undefined and unspecified trade practices may be enjoined through an action by the state Attorney General.

Aside from its reliance on the McCarran Act, the Court also held that the injuries alleged by plaintiff "seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15" (A32).

Finally, as to defendant Commission members, the Court held that (1) the action is in substance one against the state and hence the Court has no jurisdiction and (2) the Sherman Act does not apply to activities of state officers "directed by the state legislature" (A33).

The District Court's Order of Dismissal was entered January 18, 1957 (A33). The United States Court of Appeals for the First Circuit, in a one-sentence *per curiam* opinion, affirmed the District Court decision (A36), and its judgment was entered April 11, 1957 (A36).

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*The Court stated that Massachusetts "provides a comprehensive statutory scheme for the regulation of all phases of the insurance business, Mass. G. L. Ch. 174A through 178" (A30), but did not discuss any of these chapters other than chapter 176D.

## Reasons for Granting the Writ.

The instant case presents questions of significant importance in the correct interpretation of the McCarran Act, enacted by Congress to offset the effect of this Court's decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which established that the business of insurance was subject to the Sherman Act. The McCarran Act granted to the states a three-year moratorium during which they could by legislation occupy the field covered by the Sherman Act, in so far as it applied to the insurance business, and thereby oust the Federal Courts from jurisdiction. Three alternatives were open to the states:

1. Authorize (by statute) acts or conduct in the insurance business which, without legislation, would violate the Sherman Act.
2. Enact new (or amend existing) Sherman Act type statutes applying to the insurance business.
3. Fail to act, in which event the Sherman Act would apply at the end of the moratorium.

Regardless of which alternative was followed, the citizens were to be protected and the relief afforded by the Sherman Act was to continue in all areas not covered by state legislation.

The Courts below, however, have created a vacuum never intended by Congress; under the holding below, if allowed to stand, citizens receive no protection in states which have neither authorized conduct in violation of the Sherman Act nor enacted Sherman Act type statutes prohibiting combinations or conspiracies in restraint of trade or commerce. As a result citizens of thirty-two of the

forty-eight states are without any relief* whatever from violations of the Sherman Act in the insurance business: they are at the mercy of the giant insurance industry.

The business of insurance affects practically every citizen of the United States. At the close of 1956, the total coverage of life insurance *only* in the United States approached $475,000,000,000.00.† This Court in *South-Eastern Underwriters* case, *supra*, described the insurance industry as "one of the largest and most important branches of commerce." The holding below restores this industry to the favored position it was thought to enjoy prior to the decision in the *South-Eastern Underwriters* case, *i.e.*, unfettered by the prohibitions of the Sherman Act which apply to practically all other businesses. The plain intent of Congress—that the Sherman Act should apply to the insurance business to the extent that the states have not affirmatively acted to protect the public, is thwarted.

This case squarely presents for the first time in this Court the question of the extent to which the states, under the McCarran Act, must regulate the insurance business to exempt it from the application of the Sherman Act. It is our contention that the McCarran Act requires affirmative specific state legislation similar to the Sherman Act to accomplish this purpose and that, since Massachusetts has failed to enact such legislation, the Courts below erred in holding that petitioner cannot maintain this action for treble damages pursuant to the Clayton Act.

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*As demonstrated within, pages 17 to 20, Congress intended that the antitrust laws would still apply as to any ground thereof not covered by state legislation. Under Section 4 of the Clayton Act a person injured by reason of anything forbidden by the antitrust laws may sue for triple damages. Yet here such a right to sue has been avoided.

†"The Life Insurance Fact Book—1957" published by the Institute of Life Insurance Companies, 488 Madison Avenue, New York, N.Y.

A further question of equal importance is presented here. The Courts below have held that petitioner cannot maintain this action under the Clayton Act because the injuries alleged in the complaint "seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15" (A32). This holding is in direct conflict with decisions of Courts of Appeals in other Circuits and is contrary to the express language of the Clayton Act giving a cause of action for treble damages to *any person* injured by a violation of the antitrust laws.

Finally, under the holding below, defendant Commission members are being allowed to escape responsibility for a violation (non-official action) of the Sherman Act despite clear holdings to the contrary by this Court.

## I.

THE SHERMAN ACT APPLIES TO INSURANCE IN STATES WHICH HAVE NOT ENACTED SHERMAN ACT TYPE STATUTES COVERING INSURANCE; THE MASSACHUSETTS STATUTES RELIED ON BY THE COURTS BELOW DO NOT FORECLOSE PRIVATE ACTIONS UNDER THE SHERMAN ACT.

### A. State Sherman Act type statutes are essential under the McCarran Act.

On June 5, 1944, this Court, in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, held that the business of insurance was commerce; that, when conducted across state lines, it was interstate commerce and therefore subject to the Sherman Act. Thereafter Congress, in 1945, enacted the McCarran Act. Under this Act, the Sherman Act and related Acts were made inapplicable to the business of insurance until January 1, 1948.* How-

*By amendment in 1947 the moratorium was extended to June 30, 1948 (Act of July 25, 1947, c. 326, 61 Stat. 448).

ever, the Act specifically provides that, at the end of the moratorium, the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law." It is this portion of the statute just quoted which urgently requires clarification and interpretation by this Court.

Two-thirds of the states (see Appendix B) either have no Sherman Act type statutes or have Sherman Act type statutes which do not, either by the terms of the statute or by case law, specifically apply to the business of insurance. Massachusetts is among this group of states. The remaining one-third of the states (see Appendix C) have Sherman Act type statutes which do apply to the business of insurance.

It is obvious from the express language of the McCarran Act, from its legislative history and from the action of several state Legislatures subsequent to the enactment of the McCarran Act, that, without state Sherman Act type legislation, the Federal Courts continue to have jurisdiction over Sherman Act violations.

*Plain meaning of the McCarran Act.*

The provisions of the McCarran Act which are particularly pertinent here are found in 15 U.S.C. § 1012 (b), which provides:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as

amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The plain and unmistakable meaning of the proviso in the quoted section is that, after June 30, 1948, the Sherman Act is fully applicable to the business of insurance except to the extent that that business has been regulated by state law. If a state regulated only one phase of the insurance business which would otherwise be subject to the Sherman Act (*e.g.*, rate regulation), all other phases of the business would remain subject to the Sherman Act. Merely enacting legislation authorizing rate regulation would not be sufficient to remove the full impact of the Sherman Act from the insurance business. If the statute were otherwise construed, no meaning whatever would be attributed to the all-important words of the proviso "to the extent." The only possible meaning of these words is that the Sherman Act can be made totally ineffective with respect to the insurance business only by state regulation which accomplishes the exact same result which the Sherman Act itself accomplishes.

If Congress so desired, it could have provided that the Sherman Act *shall not* apply to the business of insurance if the state regulates that business. Had Congress used such language, then any state regulation of insurance would be sufficient to prevent operation of the Sherman Act. The holding of the Courts below would be correct if the McCarran Act were so worded. However, Congress, which is fully capable of drafting legislation to express its intent, did not so provide; it provided affirmatively that the Sherman Act *shall be applicable* to the business of insurance and the only exception to its appli-

cation is those areas where the states have affirmatively acted to remove its impact. The Sherman Act is made ineffective only "to the extent" that the states act; otherwise it is fully effective.

*Legislative history of McCarran Act.*

The language of the McCarran Act seems crystal clear and free from ambiguity by its literal terms: "* * * the Sherman Act * * * shall be applicable to the business of insurance to the extent that such business is not regulated by State law." Only one interpretation is possible, namely, that any state which failed to legislate so as to include the scope of the Sherman Act permitted the Sherman Act to become effective again after June 30, 1948. However, the legislative history of the Act completely dispels any other interpretation.

The House Report which accompanied the basic bill which ultimately became the McCarran Act stated:

> "It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts." (H.R. Rep. No. 143, 79th Cong., 1st Sess., p. 3.)

Thus, states which desired to make the Sherman Act inapplicable to the insurance business had to enact legislation to permit conduct which otherwise would be in violation of the Sherman Act. The nature of the state action necessary to make the Sherman Act inapplicable is best disclosed by the debate in the Senate where it was made clear that affirmative action by the states covering the

*same ground covered by the Sherman Act* was intended by Congress. The following debate took place:

"MR. MURDOCK. So that during the moratorium it is intended, is it not, that the States *shall affirmatively step into the regulation of the insurance business?*

"MR. MCCARRAN. *That is correct.*

"MR. MURDOCK. And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective except—

"MR. MCCARRAN. Except as the States themselves have provided regulations." (91 Cong. Rec. 1442 (1945); emphasis supplied.)

"MR. PEPPER. * * * Does that mean that after January 1, 1948, the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?

"MR. MCCARRAN. The answer to that question is 'Yes'. During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act, the Clayton Act, and the other acts. *If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.*" (91 Cong. Rec. 1443 (1945); emphasis supplied.)

"MR. MURDOCK. I think that therein lies a very important feature of this whole matter. I agree thoroughly with the Senator from Maine that *insofar as the States step into the picture affirmatively and act*

*by regulation, they may do so.* As the Senator from Wyoming has said, we convey no authority, we simply recognize their right to regulate. *Insofar as they fail to cover the same ground covered by the Sherman Act and the Clayton Act, those acts become effective again.*" (91 Cong. Rec. 1444 (1945); emphasis supplied.)

This debate also shows clearly that in cases where the states, although attempting to deprive the Sherman Act of jurisdiction by legislation, do not adequately cover the field covered by the Sherman Act, then the Sherman Act still applies in those states. Thus Senator Barkley asked the following question:

> "I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, it is the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover; these acts still would apply?" (91 Cong. Rec. 1444 (1945).)

Senator McCarran, a member of the Conference Committee which drafted the final language of the bill and one of the managers of the bill on the floor, replied: "That is my interpretation" (91 Cong. Rec. 1444 (1945)).

There could be no more positive expression of Congressional purpose: the Sherman Act, after the moratorium, was to be immediately applicable in those states which failed to cover the ground covered by the Sherman Act; states were not to be allowed to divest the Sherman Act of its application by merely going through the form of

legislation—they were required to act affirmatively and to give to the public the same protection in the insurance field which the Sherman Act gives in every other field of business. The insurance industry was put on probation during the moratorium period—it was not given a pardon from the Sherman Act.

*Actions by state Legislatures.*

Since the McCarran Act was enacted in March, 1945, at least three states* either amended existing Sherman Act type statutes to make them apply to the insurance business or enacted new Sherman Act type statutes which apply specifically to the insurance business. The history of the amendment of the New York statute is particularly enlightening.

In 1945 the New York statute (General Business Law, § 340, commonly called the Donnelly Act) was directed at acts designed to gain a monopoly of or impose restraints upon "the manufacture, production, marketing or sale of any article or product or service used in the conduct of trade, commerce or manufacture."† The New York Attorney General, in an opinion dated February 10, 1947, ruled that insurance did not fall within any of these categories, and consequently was not subject to the Donnelly Act (1947 Ops. Atty. Gen. 200). In his opinion he stated at page 205:

> "The moratorium contained in the McCarran Act was to permit the States to enact laws which would constitute regulation precluding the general operation of the Federal anti-trust laws upon insurance and pre-

*Indiana, New York and Washington.

†The Massachusetts Sherman Act type statute (Mass. G.L. (Ter. Ed.) c. 93, Section 2) applies to articles or commodities in common use.

serve plenary State authority over that business. If this State is to foreclose both the necessity and the occasion of Federal intervention, it would obviously be preferable that it be done by action certain in its application in response to the invitation of Congress to the States to assume the responsibility of leaving no unregulated area so far as restraint of trade in the insurance business is concerned, else the Federal Government will do so. The McCarran Act declares that no Act of Congress is to be deemed applicable to insurance unless specifically so stated. In this State the business of insurance has been subject to regulation under a detailed statute specifically designed for that purpose; administered by a separate department of the State government having that exclusive function. The way is clearly pointed to specific legislative enactment as a part of the State's system of regulating the business of insurance within its borders."

Thereafter a Joint Legislative Committee, in a report dated March 12, 1948, recommended to the Legislature that the Donnelly Act be amended so as to apply specifically to insurance (New York Legislative Documents, 1948, vol. 7, Document No. 46). In replying to objections to this recommendation, the Committee stated at pages 35-36 of its report:

"Some objection was voiced by Industry to the Committee's proposal. They argued in brief that adequate regulatory power was vested in the state and in the Superintendent by the Insurance Law generally and by the enactment of the Fair Trade Bill discussed in Part III, to oust the Sherman Act from application. With that argument this Committee has not agreed. As stated, there is no regulation of action in concert

generally in the Insurance Law, and the Fair Trade Bill, while necessary, is only supplemental to a prohibitory statute.

"The Fair Trade Bill, as will later be discussed, establishes administrative procedure to check various unfair competitive practices in their incipiency and before court action becomes necessary. The Donnelly Act, as amended, is intended to break up unlawful combinations after they have been formed.

"Furthermore, as indicated, the Donnelly Act carries with it adequate punishment for violation. The most that the Superintendent or Attorney General can do under the Fair Trade Act is to obtain a cease and desist order which might well be a disproportionately weak punishment where gross harm has been done. Certainly, if the Sherman Act is to be ousted from jurisdiction, something substantial in the way of relief for an aggrieved person should be substituted.

"There is one further argument for the proposal which should be mentioned. If the Federal statutes are ousted, a person who has a just grievance, in that he has been harmed by an insurance combination engaged in an illegal concerted activity, may not go to the Federal authorities unless the matter involves boycott, coercion or intimidation. If he goes to the Superintendent and does not receive relief under the fair trade provisions of the law, he may still go to the State Attorney General for relief; or he may commence a common law action for damages. He has a choice of remedies—a choice he now possesses under Federal procedure. Certainly his rights should be no less confined under state procedure. His right to select the tribunal which most adequately protects his interests should not be restricted, for the prime intended beneficiary of the Sherman and related Federal acts

was the victim of monopoly and restraint of trade. So, too, should he be the primary concern of our complimentary [*sic*] acts."

Thereafter the New York Legislature amended the Donnelly Act to apply specifically to insurance (L. 1948, c. 502).

There is no valid basis for distinguishing the situation described above which existed in New York after the enactment of the McCarran Act from the situation which exists today in Massachusetts and thirty-one other states. Just as it was necessary for New York to amend its Donnelly Act to apply specifically to insurance, so also it was necessary for these thirty-two states to either amend their Sherman Act type statutes or adopt new Sherman Act type statutes which would apply specifically to insurance. In the absence of such legislation the business of insurance in these thirty-two states, including Massachusetts, is subject to the provisions of the Sherman Act.

**B. The Sherman Act applies to the insurance business in Massachusetts.**

The Courts below held that the Sherman Act is inapplicable to the "transaction" alleged in the complaint herein (a combination and conspiracy in restraint of trade) because the "transaction" is regulated by the laws of Massachusetts. The Massachusetts statutes relied on by the Courts will be considered seriatim.*

* In its opinion the District Court also referred to chapters 174A to 178 of the General Laws of Massachusetts (A30) but did not rely on any of these chapters (except 176D, discussed *infra*, pp. 25-29) to support its finding that the "transaction" here is regulated by Massachusetts statutes. Therefore these general statutes, which obviously do not regulate the insurance business in the sense intended by the McCarran Act, do not warrant consideration herein.

*Massachusetts General Laws (Ter. Ed.) chapter 32A.*

This chapter was enacted to provide a program of group insurance for state employees. Section 1 of the chapter specifically provides:

> "The purpose of this chapter is to provide a program of group life insurance, group accidental death and dismemberment insurance for certain persons in the service of the commonwealth, and group general or blanket hospital, surgical and medical insurance for such persons and their dependents."

Nowhere in the chapter is there any provision regulating combinations or conspiracies in restraint of trade in the insurance business, the "transaction" alleged in the complaint herein. The Courts below held, however, that, since the chapter authorized the Commission to negotiate with and purchase from insurance companies the insurance necessary to carry out the purpose of the chapter, this was sufficient regulation to oust the jurisdiction of the Federal Courts under the Sherman Act.

The fallacy of this holding is obvious. The McCarran Act provides that the Sherman Act "shall be applicable to the business of insurance to the extent that *such business* is not regulated by State law." Chapter 32A does not regulate the "business of insurance"; it does not even purport to do so. It merely authorizes the Commission to act as purchasing agent for the state. Under the plain wording of the McCarran Act, the only state legislation which will preempt the field of the Sherman Act is regulation of combinations or conspiracies in restraint of trade—a state statute which does not so regulate obviously cannot have the effect of ousting the jurisdiction of the Federal Courts under the Sherman Act.

*Massachusetts General Laws (Ter. Ed.) chapter 176D.*

This chapter is the Massachusetts Unfair Trade Practices Act which applies to insurance. It declares that no person in the state shall engage in an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. Eight such methods of competition or practices are defined in the Act,* none of which even remotely applies to the situation here involved. The Act also contains an "omnibus" provision (Appendix A, pp. 43-44, Section 9) under which undefined and unspecified trade practices, which the Commissioner of Insurance (a defendant here) believes after a hearing to be unfair or deceptive, may be enjoined through an action by the state Attorney General. Although the conspiracy in restraint of trade alleged in the complaint herein is not one of the practices defined in this Act, the Courts below held that "This chapter is an additional ground for holding that the transaction set forth in the complaint is one regulated by the law of Massachusetts and hence removed from the application of the Sherman Act" (A31). In this the Courts erred.

As shown above (pp. 14-23), a state statute can only oust the Federal Courts of jurisdiction of an action under the Sherman Act if it covers the same ground as the Sherman Act. It is obvious that the Massachusetts Unfair Trade Practices Act, failing as it does to define conspiracies in restraint of trade or commerce as unfair practices, has not covered the same ground as the Sherman Act, and therefore the Sherman Act is still applicable to the acts complained of in the complaint herein.

The only possible basis upon which it could conceivably be said that chapter 176D covers the same ground as the Sherman Act, in so far as it is here involved, is by reliance

* False statements; false advertising; defamation; boycott, coercion and intimidation; false financial statements; stock operations; unfair discrimination; and rebates.

on the "omnibus" provision of the Act (Appendix A, pp. 43-44, Section 9). To so hold, however, is to ignore the obvious meaning of the words of the Act, the undoubted purpose for which it was enacted and the actions of other states similarly situated.

Unfair Trade Practices Acts applying to insurance have been adopted in thirty-six states.* Twenty-seven of these Acts have "omnibus" provisions similar to those found in the Massachusetts Act. Research has failed to disclose any case interpreting the "omnibus" provision of any Unfair Trade Practice Act. These "omnibus" provisions must be construed consistently with the Acts in which they appear. They appear in Acts directed, not at combinations or conspiracies in restraint of trade (as the Sherman Act is), but at unfair practices in the insurance business similar to the unfair practices in other businesses at which the Federal Trade Commission Act is primarily directed. These are practices which in and of themselves do not constitute violations of the Sherman Act but which, if allowed to grow and develop, may at some future date become violations of the Sherman Act. The "omnibus" provisions can only be construed as extending to such practices—to hold otherwise is to extend the scope of these acts far beyond any reasonable construction of them.

There can be no doubt that the state Unfair Trade Practices Acts were enacted for one purpose and one purpose only—to prevent the Federal Government from regulating the same practices under the Federal Trade Commission Act. Under the McCarran Act, after the moratorium the Federal Trade Commission Act (in addition to the Sherman and Clayton Acts) would apply to the insurance business to the extent that the states failed to enact

* States which do not have such statutes are Alabama, California, Delaware, Idaho, Illinois, Missouri, Montana, Oregon, North Dakota, Rhode Island, Texas and Vermont.

legislation covering the same field. The states which have such statutes may have succeeded in ousting the Federal Trade Commission from jurisdiction over the insurance business. *The American Hospital & Life Insurance Company* v. *Federal Trade Commission*, 1957 (C.C.H.) Trade Cases, par. 68,675 (5th Cir., April 9, 1957). *National Casualty Co.* v. *Federal Trade Commission*, 25 U.S. Law Week 2597 (6th Cir., June 6, 1957). However, this does not mean that the same statutes are effective to preempt the field of the Sherman Act, and the "omnibus" provisions of these statutes should not be construed to give them this effect. To do so is to ignore the obvious meaning of the McCarran Act. The Federal Trade Commission Act was designed to supplement the Sherman Act by establishing a purely administrative procedure to check various unfair practices in their incipiency and before Court action became necessary. It established preventive, not compensatory, corrective or punitive machinery such as is provided by the Sherman and Clayton Acts. If all that Congress intended when it enacted the McCarran Act was that there be an administrative procedure to check in their incipiency unfair practices in the insurance business it would have made only the Federal Trade Commission Act effective at the end of the moratorium. It did not do so; it made the Sherman and Clayton Acts also effective at the same time. Obviously this means that to prevent the Sherman and Clayton Acts from becoming effective at the end of the moratorium the states had to enact legislation covering the same ground as the Sherman and Clayton Acts, just as they enacted Unfair Practices Acts covering the same ground as the Federal Trade Commission Act. The "omnibus" clause in the Act creating an administrative procedure cannot fill the void caused by the failure to enact legislation establishing compensatory, corrective or punitive

machinery such as is provided by the Sherman and Clayton Acts.

Furthermore, the fact that state Unfair Trade Practices Acts which include "omnibus" provisions do not preempt the field of the Sherman Act is forcefully demonstrated by the statutes of other states. Eight states[2] having Unfair Trade Practices Acts applying to insurance which include "omnibus" provisions similar to that found in the Massachusetts Act *also* have Sherman Act type statutes applying specifically to insurance. If "omnibus" provisions were sufficient to preempt the field of the Sherman Act, obviously Sherman Act type statutes applying to insurance were unnecessary. But the Legislatures of eight states recognized that both types of legislation were necessary. The manifest reason is that an "omnibus" provision does not preempt the field of the Sherman Act. The Joint Legislative Committee in New York which conducted an exhaustive study of this subject concluded that both types of statutes were necessary because the Unfair Trade Practices Act was "only supplemental to a prohibitory statute" and that, "if the Sherman Act is 'to be ousted from jurisdiction, something substantial in the way of relief for an aggrieved person should be substituted" (*supra*, p. 22).

To make the Sherman Act inapplicable in states which have adopted only an Unfair Trade Practices Act is to ignore the plain language of the McCarran Act and Congressional intent that, unless the states adequately cover the field covered by the Sherman Act, then the Sherman Act remains effective. It creates the very situation which Congress sought to avoid, *i.e.*, the absence of any type of prohibition, either state or Federal, against monopolies or

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[2] Arkansas, Georgia, Iowa, Kansas, Mississippi, Nebraska, New York, South Carolina. In another three states (Indiana, Utah, Washington) the Unfair Practices Act specifically includes Sherman Act type violations.

restraints of trade in the insurance business. This Court should review this question of vital importance and establish clearly that, in the absence of definite, specific state legislation covering the same field as the Sherman Act, a person injured by a violation of the Sherman Act can resort to the Federal Courts for relief.

## II.

THE HOLDING THAT SECTION 4 OF THE CLAYTON ACT DOES NOT AFFORD A REMEDY TO PETITIONER IS IN DIRECT CONFLICT WITH DECISIONS OF COURTS OF APPEALS FOR OTHER CIRCUITS AND DISREGARDS A RECENT ADMONITION OF THIS COURT.

The Courts below held that the injuries set forth in plaintiff's complaint "seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15 [Section 4 of the Clayton Act]" (A32). The statute cited does not establish any "class of indirect and speculative injuries"; to the contrary, it expressly states in the broadest possible language that "*Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *" (Emphasis supplied.) Regarding this language, the Court in *Röschlau v. Phister Mfg. Co.*, 125 F. 2d 417 (7th Cir., 1942) said at page 419:

> "The language of the statute is general and all inclusive. It includes any person who shall be injured in his business or property."

This Court, as recently as February of this year, has warned that the Courts should not add limitations to burden private litigants in actions under the antitrust laws "beyond what is specifically set forth by Congress in

those laws". (*Radovich v. National Football League*, 352 U.S. 445, 454). The holding below completely disregards this admonition by limiting the category of persons who may maintain private actions under the antitrust laws despite the fact that Congress in the statute quoted above has expressly provided that "any person" injured may sue.

The Courts below, in holding that plaintiff's injuries fall in "the class of indirect and speculative injuries" relied on *Melrose Realty Co., Inc., v. Loew's Inc.*, 234 F. 2d 518 (3d Cir., 1956), and *Productive Inventions, Inc., v. Trico Products Corp.*, 224 F. 2d 678 (2d Cir., 1955), both of which followed the rationale of *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (D.C. E.D. Pa., 1953); aff'd on opinion below 211 F. 2d 405 (3d Cir., 1954); cert. den. 348 U.S. 828 (1954). This judicial limitation on the persons who may sue is based on a theory that, because of the severity of the penalty provided in the antitrust laws, some line must be drawn to prevent windfalls to plaintiffs and excessive liabilities on defendants who violate the antitrust laws. *Harrison v. Paramount Pictures, Inc., supra. Snow Crest Beverages, Inc., v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D.C. D. Mass., 1956).

However, this theory has been expressly rejected by the Court of Appeals for the Seventh Circuit in *Rockland v. Plastex Mfg. Co.*, 125 F. 2d 417 (1942), where the Court at page 420 stated:

> "We may not by what seems to us a strained and unjustified limitation bar plaintiff from the statutory remedy. 'Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law': Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241."

A similar conclusion was reached by the same Court in *Kansas Building Corporation v. Loew's Incorporated*, 1957 (C.C.H.) Trade Cases, par. 68,725 (7th Cir., May 21, 1957), where the Court stated at page 72,963:

> "In these circumstances we do not believe that recovery should be denied on some vague notion that 'a line must be drawn'. We therefore decline to follow the rule laid down by the Third Circuit in the *Harrison* and *Maltzes* decisions."

The Court of Appeals for the Ninth Circuit, in *Steiner v. 20th Century-Fox Film Corp.*, 232 F. 2d 190 (1956), also refused to follow the rule of the *Harrison* case, *supra*, in a factual situation which was indistinguishable.

Thus we have a situation where plaintiffs in private antitrust suits in the First, Second and Third Circuits are being deprived of relief while plaintiffs similarly situated in the Seventh and Ninth Circuits are allowed to recover. The time has arrived for this Court to settle this conflict between the Circuits and to resolve this important question in the field of private antitrust law. We submit that the holding below should be rejected and that the rule established in the Seventh and Ninth Circuits should be approved, for this is the only rule which is consistent with the language of the statute (15 U.S.C. § 15), with encouraging respect for the antitrust laws and with the clear principle recently enunciated by this Court in the *Radovich* case, *supra*, that the Courts should not add limitations to burden private antitrust litigants beyond those specifically provided by Congress.

Even if this Court were to approve the limitation adopted by the First, Second and Third Circuits, the holding below that plaintiff's injuries fall in the special class of indirect injuries is erroneous. Plaintiff here has alleged that he is an independent insurance broker who was injured by a con-

spiracy in violation of the Sherman Act. It has been held repeatedly that a sales agent may recover lost commissions in an action under the antitrust laws. *Rosland v. Phister Mfg. Co.*, 125 F. 2d 417 (7th Cir., 1942). *Times v. General Outdoor Advertising Co.*, 171 F. 2d 487 (2d Cir., 1948). *Mc Whirter v. Monroe Calculating Mach. Co., Inc.*, 76 F. Supp. 456 (D.C. W.D. Mo., 1948). *Klein v. Sales Builders, Inc.*, 1950-1951 (C.C.H.) Trade Cases, par. 62,950 (D.C. N.D. Ill., 1951). Plaintiff here is in the same position as the sales agent. He is not in the same category as the plaintiffs in the cases cited by the Court below. Thus in the *Metrose Realty Co.* case, *supra*, p. 30, plaintiff, the non-operating lessor of a movie theater, by his lease had relinquished all present interest in the theater; in the *Practice Inventions* case, *supra*, p. 30, plaintiff patentee had granted to another an exclusive license upon a royalty basis. Plaintiff here has not relinquished any interest in his insurance brokerage business; he was in active direct competition with the defendant insurance companies. It was clearly erroneous to place him in the same category as plaintiffs, who had voluntarily relinquished their present property rights, and thereby deprive him of his right to recover under the antitrust laws.

## III.

DISMISSAL OF THE COMPLAINT AGAINST DEFENDANT COMMISSION MEMBERS WAS THE RESULT OF AN ERRONEOUS APPLICATION OF DECISIONS OF THIS COURT.

The holding below, dismissing the complaint against defendant Commission members only, is based on an erroneous application of decisions of this Court. Under it, members of a state commission would be forever free to violate the antitrust laws merely by virtue of their membership on the commission. Such is not the interpretation of the Eleventh Amendment to the Constitution of the

United States as expressed by this Court, since the immunity of a state from suit does not extend to state officers when their activities exceed the authority granted them under the state law. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). In that case this Court stated at page 297:

> "The Eleventh Amendment, which denies to the citizen the right to resort to a Federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer."

The complaint here alleges and the District Court assumed that defendant Commission members conspired with other defendants in violation of the Sherman Act. Nowhere in chapter 32A of the General Laws of Massachusetts has the Legislature authorized the members of the Commission to enter into a conspiracy in connection with their duties of purchasing insurance and administering a private insurance plan for employees of the Commonwealth.

This is the basic distinction between this case and *Parker v. Brown*, 317 U.S. 341 (1943), relied upon by the Courts below. In that case the Court found that the California Legislature, in enacting the California Agriculture Prorate Act, specifically authorized a scheme of state action imposing restrictions upon the sale within the state of certain crops, the purpose and effect of which was to raise and maintain prices and eliminate competition between producers. Here we have no such state legislation authorizing official action in violation of the Sherman Act. In the absence of such authorization, the defendants are individually liable for their acts.

Since there was no state legislation authorizing defendant Commission members to violate the Sherman Act, the

Courts below erred in holding that the action was in substance one against the state. It is well settled that whether or not an action against state officials is in substance an action against the state depends on who is the real party in interest, and this is determined, not by the names of the parties of record, but by the result or impact of the judgment which will be obtained. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386 (1902). *Ex parte Ayers*, 123 U.S. 443, 489-491 (1887). *Hagood* v. *Southern*, 117 U.S. 52, 67 (1886). Here, a judgment against defendant Commission members would be one against them in their individual capacities and not as state officials; the state could not be held liable for payment of any judgment obtained.

Finally, even if the Courts below correctly held that respondent Commission members cannot be held individually liable for conspiring with the other respondents to the detriment of petitioner, this holding does not affect the status of the other respondents. As to them, the action may be maintained, for they cannot hide behind the cloak of sovereign immunity which applies, if at all, only to respondent Commission members.

## Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 9, 1957.

## Appendix A.

### Massachusetts Statutes.

MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 93.

* * * * * * * * *

SECTION 2. [*Monopolies and Discriminations in the Sale of Articles, etc., in Common Use Prohibited.*] Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

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MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 32A.

(Inserted by Acts of 1955, Chapter 628, and amended by Acts of 1956, Chapter 582.)

SECTION 1. [*Purpose of Chapter.*] The purpose of this chapter is to provide a program of group life insurance, group accidental death and dismemberment insurance for certain persons in the service of the commonwealth, and group general or blanket hospital, surgical and medical insurance for such persons and their dependents.

SECTION 2. [*Definitions.*] The following words and phrases as used in this chapter shall have the following meanings:—

(*a*) "Commission", the state employees' group insurance commission.

(*b*) "Employee", any person in the service of the commonwealth, whether such person be employed, appointed or elected by popular vote; provided, the duties of such person require that his time be devoted to the service of the commonwealth during the regular work week of permanent employees, except that persons elected by popular vote will be considered employees during the entire term for which they are elected, regardless of hours devoted to the service of the commonwealth. By way of illustration but not limitation, a person appointed or elected by popular vote shall include employees of the general court, state officials, constitutional officers and members of the general court, but shall in no event be construed to include members of the judiciary paid in whole or in part from other than state funds, seasonal employees or emergency employees. A determination by the commission that a person is eligible for participation in the plan of insurance shall be final and shall be binding on all parties.

(*c*) "Employer", the commonwealth of Massachusetts.

(*d*) "Dependents", an employee's spouse and an employee's unmarried children under nineteen years of age.

(*e*) A person is deemed to work a regular work week of permanent employment when he meets the applicable requirements of section five of chapter eight, sections thirty and thirty A of chapter one hundred and forty-nine, or any general or special law pertaining to a regular work week of permanent employment; or whose duties require no less than twenty hours, regularly, in the service of the commonwealth during the regular work week. In the event that a department head is unable to apply the terms defined

above to a specific set of circumstances all facts relative thereto shall be submitted to the commission for a determination of eligibility and such determination shall be final.

SECTION 3. [*State Employees' Group Insurance Commission; Members, Executive Secretary, Rules and Regulations.*]. There shall be established within the commission on administration and finance, but not under its jurisdiction, a special unpaid commission, to be known as the state employees' group insurance commission, consisting of the commissioner of administration, the commissioner of insurance, and three members to be appointed by the governor, with the advice and consent of the council. At least one member appointed by the governor shall be a state employee, and not more than two appointive members of the commission shall be members of the same political party. No member appointed by the governor shall be an insurance agent, broker, employee or officer of any insurance company. Upon the expiration of the term of office of any appointive member, his successor shall be appointed in like manner for a term of three years. The commission shall be provided with suitable offices in the state house and may, subject to appropriation, incur expenses and appoint an executive secretary and such other employees as may be necessary to administer the provisions of this chapter. There shall be paid by the commonwealth to each appointive member of said commission the necessary expenses actually incurred in the discharge of his official duties. The executive secretary shall be the executive and administrative officer of the commission and shall not be subject to the provisions of chapter thirty-one. The commission shall adopt such reasonable rules and regulations as may be necessary for the administration of this act and shall make an annual report to the governor and to the general court which shall be in such form as to enable employees to

understand the benefits available from the insurance program, including the cost thereof.

SECTION 4. [*Insurance Policies, etc.*] The commission shall negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations, a policy or policies of group life and accidental death and dismemberment insurance covering persons in the service of the commonwealth, and group, general or blanket insurance providing hospital, surgical and medical benefits covering persons in the service of the commonwealth and their dependents, and shall execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth. Said commission may negotiate a contract for such term not exceeding three years as it may, in its discretion, deem to be the most advantageous to the commonwealth: provided, however, that the portion of the cost of the premium per month to be borne by the commonwealth shall not exceed the estimated monthly cost for which funds have been appropriated by the general court for the then current fiscal year.

For the purposes of this chapter, any savings bank authorized to engage in the insurance business in accordance with chapter one hundred and seventy-eight, and any non-profit hospital service corporation or non-profit medical corporation organized under chapter one hundred and seventy-six A or one hundred and seventy-six B shall be and is hereby authorized to enter into a reinsurance agreement as herein provided in the same manner as any other insurance company.

SECTION 5. [*Insurance of State Employees Under Policies Regulated.*] Each employee shall be automatically insured for all insurance coverages provided under said

policy or policies, commencing on the date he first becomes eligible or on the effective date of such coverage or coverages, including dependent benefits, whichever last occurs; provided, that any employee desiring not to be so insured, shall, on an appropriate form prescribed by the commission, give written notice to the commission that he is not to be insured for any of such coverages, including dependent benefits, provided under such policy or policies. Such notice shall be mailed to the office of the commission at least thirty days prior to the effective date of the policy or policies insuring said employee. If the employee fails to give notice as herein provided or, in the event an employee desires to terminate his insurance, he may withdraw, and such insurance benefits shall cease to be effective on the date to which the premium has been paid. In determining said date, payroll deductions or direct payments on behalf of the employee shall continue to be made until the expiration of fifteen days from the receipt of notice of withdrawal by the commission. Every policy, whether original or renewal, shall provide, in the case of employees now covered by group insurance benefits, protection by continuing uninterrupted coverage without regard to waiting periods for benefits.

SECTION 6. [*Amounts of Insurance, Benefits, etc., Regulated.*] The amount of group life insurance on each employee shall be two thousand dollars, and the amount of group accidental death and dismemberment insurance on each employee shall be two thousand dollars. The amount of the hospital, surgical and medical benefits to be provided each employee and his dependents shall be determined by the commission subject to the provisions of section four.

SECTION 7. [*Information to Be Furnished by Employees.*] Each employee to whom this chapter applies shall furnish the commission, in such form as it shall prescribe, such information as is necessary to enroll himself, or him-

self and his dependents, under the policy or policies of insurance.

SECTION 8. [*Salary Withholdings, etc.*].

(*a*) With respect to any period of insurance which is in effect for an employee, there shall be withheld from each payment of salary or wages of such employee fifty per cent of the premium for such insurance and the commonwealth shall contribute the remaining fifty per cent of the said premium.

(*b*) If an employee is entitled to receive, during a calendar month, salary, wages or other compensation and the premium has not been withheld from said salary, wages or other compensation, he may continue his insurance in effect by paying directly to the commission the premium which would otherwise have been deducted from his salary, wages or other compensation. If an employee is not entitled to receive salary, wages or other compensation for a calendar month, he shall for the purposes of this chapter be deemed to have been granted a leave of absence without pay and shall make payment for the entire cost of his insurance to the commission as aforesaid and there shall be no contribution by the commonwealth for such employee's insurance. If an employee is not entitled to receive salary, wages or other compensation for any calendar month, due to illness of such employee and not because of illness of his immediate family, for purposes of this chapter he shall be deemed to have been granted sick leave without pay, and subject to the rules and regulations of the commission, said employee shall make payment of fifty per cent of the cost of his insurance to the commission and the commonwealth shall contribute the remaining fifty per cent of said premium.

(*c*) All amounts withheld from an employee's salary or wages as provided in paragraph (*a*) and all amounts withheld from pensions or retirement allowances under the

provisions of section nineteen of chapter thirty-two shall be forwarded by the department, institution, or other agency responsible for the payment of employee salaries and wages or pensions and retirement allowances to the commission. The commission, from funds appropriated therefor, shall authorize payment of the contribution of the commonwealth as provided in said paragraphs (*a*) and (*b*), which, together with the employee payments, shall be paid at least once each month to the carrier or carriers entitled to the premium.

SECTION 9. [*Dividends, Refunds, etc.*] Any dividend or other refunds or rate credits shall inure to the benefit of the commonwealth, and shall be deposited with the treasurer and receiver-general of the commonwealth and shall be applied to the cost of such insurance.

SECTION 10. [*Retirement or Termination of Employment, Effect on Policy, etc.*] The commission shall require that, on retirement of an employee, the policy or policies of insurance shall provide that the group life coverage of such employee shall be reduced fifty per cent and the group general or blanket insurance providing hospital, surgical and medical benefits shall be continued, except that the employee shall pay the entire average premium per one thousand dollars for group life coverage, and for the hospital, surgical and medical benefits the entire group premium applicable for said employee or for said employee and his dependents. Any policy or policies issued under this chapter shall provide that, on termination of employment, an employee shall be entitled to convert his insurance to an individual type of policy, subject to the provisions of section one hundred and thirty-four of chapter one hundred and seventy-five with respect to life insurance, and subject to the requirements of the commission with respect to the other insurance coverages provided in this chapter. No employee will be permitted to convert his insurance

on separation from service more than one time if such converted insurance would result in a greater amount of insurance than is provided in section six.

MASSACHUSETTS GENERAL LAWS (TER. ED.) CHAPTER 176D (INSERTED BY ACTS OF 1947, c. 559).

SECTION 1. [*Purpose of Chapter.*] The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

* * * * * * * * *

SECTION 3. [*Prohibited Trade Practices.*] No person shall engage in this commonwealth in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

SECTION 4. [*Unfair Methods of Competition and Unfair or Deceptive Acts and Practices Defined.*]

(a) The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:—

(1) [*Misrepresentations and False Advertising as to Policy Contracts.*] * * *

(2) [*False Information and Advertising Generally.*] * * *

(3) [*Defamation.*] * * *

(4) [*Boycott, Coercion or Intimidation.*] * * *

(5) [*False Financial Statements.*] * * *

(6) [*Stock Operations or Contracts Promising Profits as Inducement to Insurance.*] * * *

(7) [*Unfair Discrimination.*] * * *

(8) [*Rebates, etc.*] * * *

SECTION 5. [*Investigative Power of Commissioner.*] The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this commonwealth in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section three.

* * * * * * * * * * * *

SECTION 9. [*Procedure as to Unfair Methods of Competition, etc., Which Are Not Defined.*]

(*a*) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaged in this commonwealth in any method of competition or in any act or practice in the conduct of such business which is not defined in section four, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by the commissioner in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section six. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(*b*) If such report charges a violation of this chapter and if such method of competition, act or practice has

not been discontinued, the commissioner may, through the attorney general, at any time after thirty days after the service of such report cause a petition to be filed in the supreme judicial court to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite.

(c) A transcript of the proceedings before the commissioner, including all evidence taken and the report and findings, shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceedings by the commissioner with respect thereto are to the interest of the public and that the findings of the commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

SECTION 10. *Judicial Review on Petition of Interested Person.* If the report of the commissioner does not charge a viola-

tion of this chapter, then any intervenor in the proceed[illegible] may, within thirty days after the service of such report, cause a petition to be filed in the supreme judicial court for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the commissioner, constitutes a violation of this chapter.

SECTION 11. [*Penalty.*] Any person who violates a cease and desist order of the commissioner under section seven after it has become final, and while such order is in effect, shall forfeit and pay to the commonwealth a sum not to exceed one thousand dollars for each violation, which may be recovered in a civil action. In determining the amount of the penalty the question of whether the violation was wilful shall be taken into consideration. Nothing herein shall be construed as limiting a court in enforcing its own orders.

SECTION 12. [*Powers of Commissioner Additional to Other Powers to Enforce Penalties, etc.*] The powers vested in the commissioner by this chapter shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

. . . . . .

SECTION 14. [*Invalidity in Part, Effect.*] If any provision of this chapter, or the application of any provision to any person or circumstances, shall be held invalid, the remainder of the chapter, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

## Appendix B.

STATES HAVING NO SHERMAN ACT TYPE STATUTE APPLICABLE TO INSURANCE BUSINESS.

*1. States having no Sherman Act type statute.*

| | | |
|---|---|---|
| Delaware | Nevada | Rhode Island |
| Kentucky | New Jersey | Vermont |
| Maryland | Pennsylvania | West Virginia |

(Kentucky and Maryland have constitutional provisions to the effect that monopolies and trusts are contrary to public policy. Vermont has legislation authorizing judicial dissolution of a corporation unreasonably restraining trade.)

*2. States having Sherman Act type statutes not specifically applicable to insurance business.*

*Alabama*: Code of Alabama, 1940, Title 37, c. 6, §§ 106-108; Title 7, c. 4, art. 5, §§ 124, 125 (limited to articles and commodities).

*Colorado*: Colorado Laws of 1957, Senate Bill No. 209, approved and effective, April 22, 1957.

*Connecticut*: General Statutes of Connecticut, 1949, Title 44, c. 424, § 8612 (limited to ice, coal or other necessities).

*Florida*: Florida Statutes Annotated, Title 31, c. 542, § 542.01 *et seq.*

*Idaho*: Idaho Code, Title 48, c. 1, § 48-101 *et seq.* and Title 18, c. 52, § 18-5201.

*Illinois*: Smith Hurd Illinois Annotated Statutes, c. 38, § 369 *et seq.* (limited to articles of merchandise and commodities).

*Louisiana*: West's LSA-Revised Statutes, Title 51, Part IV, § 121 *et seq.*

*Maine*: Revised Statutes of Maine, 1954, c. 137, § 13 [6]; c. 53, §§ 81-83.

*Massachusetts*: Massachusetts General Laws (Ter. Ed.), c. 93, § 1 *et seq.* (limited to articles and commodities in common use).

*Michigan*: Michigan Compiled Laws, 1948, c. 750, § 750.151 *et seq.*; §§ 750.537-750.560.

*Minnesota*: Minnesota Statutes Annotated, Part 5, c. 623, §§ 623.01-623.07 (limited to articles of trade, manufacture or use).

*Montana*: Revised Codes of Montana, 1947, Annotated, Title 94, c. 11, § 94-1104 *et seq.*

*New Hampshire*: New Hampshire Revised Statutes Annotated, 1955, Title 31, c. 356, §§ 356.1-356.9.

*New Mexico*: New Mexico Statutes, 1953, Annotated, c. 49, art. 1, §§ 49-1-1 through 49-1-4.

*North Carolina*: General Statutes of North Carolina, c. 75, § 75-1 *et seq.*

*North Dakota*: North Dakota Revised Code, 1943, Title 51, c. 51-08, § 51-0801 *et seq.*

*Ohio*: Page's Ohio Revised Code Annotated, Title 13, § 1331. § 1331.01 *et seq.*

*Oklahoma*: Oklahoma statutes Annotated, Title 79, c. 1, § 1.

*South Dakota*: South Dakota Code of 1939, Title 13, c. 13.18, § 13.1801 *et seq.*

*Tennessee*: Tennessee Code Annotated, Title 69, c. 1, § 69-101 *et seq.* (limited to the sale of imported articles or articles of domestic growth or raw material).

*Virginia*: Virginia Code, 1950, Title 59, c. 5, § 59.20-1 *et seq.*

*Wisconsin*: Wisconsin Statutes, 1951, c. 133, § 133.01 *et seq.*

*Wyoming*: Wyoming Compiled Statutes, 1945, Annotated, c. 39, art. 4, § 39-401 *et seq.*

## Appendix C.

STATES HAVING SHERMAN ACT TYPE STATUTE APPLICABLE TO INSURANCE BUSINESS.

*Arizona:* Arizona Revised Statutes, Annotated, Title 44, c. 10, art. 1, § 44-1401.

*Arkansas:* Arkansas Statutes, 1947, Annotated, Title 70, c. 1, § 70-100 *et seq.*

*California:* Deering's California Codes, Annotated, Business and Professions, Part 2, c. 2, arts. 1-3; § 16700 *et seq.* (held applicable to insurance companies in *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P. 2d 867 (1946)).

*Georgia:* Georgia Code Annotated, Title 2 (Constitution art. IV, § IV) c. 2-27, § 2-2701; and Title 56, c. 2, § 56-219 (Anti-Compact Law).

*Indiana:* ~~Burns'~~ Indiana Statutes Annotated, volume 5, Part 2, Title 23, § 23-101 *et seq.*; and volume 8, Part 1, Title 39, § 39-5305 and 39-5304 (Unfair Trade Practices Act in insurance with Sherman Act type coverage).

*Iowa:* Iowa Code Annotated, Title 28, c. 553, § 553.1 *et seq.*; and c. 515, § 515.131 (Anti-Compact Law).

*Kansas:* Kansas General Statutes, 1949, Part 2, c. 50, 50-101 *et seq.*

*Mississippi:* Mississippi Code, 1942, Annotated, Title 8, c. 1, § 1088 *et seq.* (held applicable to fire insurance companies in *Fire Insurance Companies v. State of Mississippi*, 75 Miss. 24 (1897)).

*Missouri:* Vernon's Annotated Statutes, c. 416, § 416.010 *et seq.* (limited to fire, lightning and storm insurance).

*Nebraska:* Nebraska Revised Statutes, 1943, c. 59, § 59-101 *et seq.* (§ 59-101, applicable to insurance, is a definition without a context; § 59-301 applies to fire insurance companies only; § 59-401 was held applicable to the business of insurance in *State v. American Surety Co.*, 9 Neb. 22).

*New York:* McKinney's Consolidated Laws of New York, Annotated, book 19, art. 22, § 349 *et seq.*

*Oregon:* Oregon Revised Statutes, 1953, Title 56, § 736.615 (Anti-Compact Law).

*South Carolina:* South Carolina Code of Laws, 1952, Title 66, c. 2, arts. 1 and 2, § 66-51 *et seq.*

*Texas:* Vernon's Texas Civil Statutes, Title 126, art. 5429 *et seq.*; Texas Penal Code, Title 19, c. 3, Art. 1632 *et seq.*

*Utah:* Utah Code Annotated, 1953, Title 20, c. 1, § 20-1-1 *et seq.*, and Title 31, c. 27, § 31-27-1 *et seq.* (Anti-Compact Laws).

*Washington:* Constitution, art. 12, § 22; and Revised Code of Washington Title 43, c. 43.30, § 43.30.010 *et seq.* (Anti-Compact Law).

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# Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 256

J. THOMAS MILEY,
*Petitioner,*
*v.*
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS,
*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF FOR THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON MUTUAL LIFE INSURANCE COMPANY, CLARENCE W. WYATT AND EDWARD A. GREEN IN OPPOSITION

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# Supreme Court of the United States

OCTOBER TERM, 1957

No. 1156

J. THOMAS MILEY,
*Petitioner,*
v.
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## BRIEF FOR THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON MUTUAL LIFE INSURANCE COMPANY, CLARENCE W. WYATT AND EDWARD A. GREEN IN OPPOSITION

Since the "Questions Presented" and "Statement" of the petitioner are misleading and argumentative, the respondents are compelled to set out the following questions presented for review and statement of the case.

### Questions Presented

The Court of Appeals in a *per curiam* opinion affirmed an order of dismissal of Judge Ford of the District Court on the memorandum of opinion issued by him. The order

of dismissal followed the allowance of motions to dismiss of the defendants which urged several grounds in support of the contention that the complaint failed to state a claim upon which relief might be granted under the Sherman Act (R. p. 29 and R. p. 33). Record references are to the petitioner's *Record Appendix*.

The questions presented as to these respondents are:

1. Is the decision of the Court of Appeals construing the McCarran-Ferguson Act, 15 U.S.C. 1011-1015, (hereinafter referred to as the McCarran Act) consistent with applicable decisions of this Court and other Courts of Appeals?

2. Is the decision of the Court of Appeals construing section 4 of the Clayton Act, 15 U.S.C. section 15, in conflict with decisions of this Court or other Courts of Appeals?

## Statement

The complaint in this case was brought under the Sherman Act, 15 U.S.C., secs. 1 and 15. The plaintiff is an insurance broker licensed in Massachusetts, Maine and New Hampshire. For many years he has been engaged in these states in the business of planning, arranging, negotiating and servicing group insurance contracts for employers with insurance companies in various states for which he has received commissions and service fees when successful (R. p. 9). The defendants are eight Massachusetts insurance companies, four individual officers of three of these companies, and the five members of the Massachusetts State Employees' Group Insurance Commission established by Mass. *General Laws*, Ch. 32A (Acts of 1955, chapter 628). (Hereinafter called the commission).

The allegations of the complaint may be summarized

as follows. In 1955, the Massachusetts Legislature enacted *General Laws*, Ch. 32A to provide a program of group life, accidental death and dismemberment insurance, and group hospital, surgical and medical coverages for employees of the Commonwealth (R. p. 9). The members of the commission in accordance with section 3 of chapter 32A consisted of the Commissioner of Administration and Finance, the Insurance Commissioner, and three appointees of the governor. This section also required the commission to "adopt such reasonable rules and regulations as may be necessary for the administration of this act—." The legislature, in section 4 of the act, directed the commission to "negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations," the group insurance contemplated by the statute; to "execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth;" to "negotiate a contract for such term not exceeding three years as it may, in its discretion, deem to be the most advantageous to the commonwealth; provided, however, that the portion of the cost of the premium per month to be borne by the commonwealth shall not exceed the estimated monthly cost for which funds have been appropriated by the general court for the then fiscal year;" and permitted "any savings bank authorized to engage in the insurance business—and any non-profit hospital service corporation or non-profit medical corporation—to enter into a reinsurance agreement as herein provided in the same manner as any other insurance company."

Subsequent to November 16, 1955, the commission published an invitation to bid to all insurance companies licensed to do business in Massachusetts for the award

of the group insurance contracts provided by chapter 32A. Such bids or proposals were to be submitted to the commission by December 1, 1955 (R. p. 10). The plaintiff "obtained" a copy of the invitation to bid, and "decided upon and enlisted the cooperation" of Minnesota Mutual Life Insurance Company, a Minnesota corporation (hereafter called Minnesota) and Massachusetts Hospital Service, Inc. (Blue Cross) and Massachusetts Medical Service (Blue Shield) (R. p. 10). On December 1, 1955, the plaintiff submitted a "package" proposal "on behalf of Minnesota and in conjunction with Blue Cross and Blue Shield" (R. pp. 11 and 12). None of these companies is a party to this suit. Among the other nineteen bids submitted by December 1, 1955, there was a joint bid by the defendant insurance companies (except Boston Mutual Life Insurance Company, hereinafter called Boston) of a rate of $1.20 per month per thousand dollars on the life, accidental death and dismemberment coverages (R. p. 12). The rate offered by Minnesota in the "package" proposal submitted by the plaintiff was $.90 per month per thousand dollars for the same coverages (R. p. 16).

Thereupon the commission ascertained from Blue Cross and Blue Shield, and so informed some of the other defendants, that Blue Cross and Blue Shield were willing to offer the same benefits for the medical, surgical and hospital coverages included in their bid with Minnesota in conjunction with any other insurance companies, provided that the rate for the life, accidental death and dismemberment coverages would not exceed the $.90 rate (R. pp. 14 and 15). The defendant insurance companies, except Boston, it is charged, then conspired to meet or better the low bid of $.90 and to eliminate Minnesota as a competitor (R. pp. 15-16). The various insurance company defendants, except Boston, could not offer a rate below the $1.20 rate they had filed with the New York

insurance commissioner without jeopardizing their right to do business in that state. Consequently, Boston, which did no business in New York, was brought into the combination (R. p. 17). On December 30, 1955, Boston successfully met or bettered the low bid of Minnesota, and the contract for the life, accidental death and dismemberment coverages was awarded to it by the commission (R. pp. 18-19). Thereafter, Boston allotted 95% of the total amount of the insurance to the other defendant companies by way of reinsurance (R. p. 18).

The complaint concludes that the plaintiff suffered injury because as a result of the defendants' alleged violation of section 1 of the Sherman Act "Minnesota failed to receive the award of the contract and thereby the plaintiff Miley was deprived of compensation for servicing said contract and commissions and service fees for new business which would have resulted had said contract been awarded to Minnesota" (R. p. 19).

## Comment On Petitioner's Statement

Contrary to the misleading comments in the petitioner's Statement (Pet. pp. 5 and 6), it does not follow from the decision of Court of Appeals that "the Sherman Act will not apply to the business of insurance in states which have regulated that business even to the slightest degree—;" that "plaintiffs in thirty-two states who are injured by violations of the Sherman Act in the insurance industry are left completely without any type of relief;" and that "the Congressional intent in enacting the McCarran Act is ignored." The decision is based on the facts pleaded in the complaint. The grounds for affirming the order dismissing the complaint pursuant to the defendants' motions to dismiss are simply as follows (R. pp. 29-33):

1. The Sherman Act did not apply to the activities of the defendants described in the complaint by reason of the McCarran Act, since Massachusetts law provided "a statutory scheme of regulation covering the very transaction complained of."

2. The plaintiff failed to allege an injury to his business or property which would entitle him to bring an action under section 4 of the Clayton Act, 15 U.S.C. sec. 15, since the injuries alleged were remote and speculative.

a. Any loss to the plaintiff of fees for servicing the group contract flowed indirectly from the failure to award to Minnesota a contract to which it was never legally entitled.

b. The plaintiff had no legal right to such fees but only "a mere hope that he would be hired by Minnesota to service the policies and thus be given a chance to earn the fees."

c. Any loss to the plaintiff of commissions and fees on future business was based "only on the expectation that if Minnesota secured this contract with the Commonwealth, its prestige would be increased which might lead to an increase in its business here on which plaintiff might become entitled to fees and commissions."

3. There is no federal jurisdiction of the suit against the members of the state commission, since it is in substance an action against the state itself and the state has not waived its immunity.

## Summary of Argument

It is submitted that the grounds of decision of the Court of Appeals for the First Circuit in this case are correct, and consistent with decisions of this Court and other Courts of Appeals. The construction of the McCarran Act by the Court of Appeals in exempting the transaction described in the complaint from the operation of the Sherman Act is supported by a decision in the Eighth Circuit, and is wholly consistent with decisions of this Court and other Courts of Appeals defining the application of the Sherman Act to the business of insurance. Finally, the holding in this case that the plaintiff's claim of injury to his business or property was too remote and speculative to entitle him to relief under section 4 of the Clayton Act is not in conflict with any decision of this Court or of other Courts of Appeals.

## Argument

### I

### The Decision of the Court of Appeals Construing the McCarran Act Is Consistent with Applicable Decisions of this Court and Other Courts of Appeals

The Court of Appeals decision, insofar as it relies on the McCarran Act in concluding that the Sherman Act is not applicable to the activities of the defendants in the context of the complaint in this case, in no way suggests the alarming consequences conjured up by the petitioner (Pet. pp. 12-13). No insurance industry behemoth is being unleashed to spread unlawful conspiracy across the land. The holding on the McCarran Act point is simply that the activities about which the plaintiff complained were regu-

lated and authorized by Massachusetts law, and that, therefore, the Sherman Act was inoperative by virtue of the McCarran Act. As the District Court decision expressed it, "Assuming that what was done here by the defendants would under other circumstances constitute a conspiracy or combination violative of the Sherman Act, it was nevertheless done in the course of, negotiation authorized and regulated by an applicable state law, and as to such transactions Congress has expressly provided that the Sherman Act shall not apply" (R. p. 30).

The Court of Appeals' decision in adopting this construction of the McCarran Act is wholly consistent with the decisions of this Court and other courts which have considered the application of the Sherman Act to the business of insurance.

### *State Regulation of the Business of Insurance Prior to the McCarran Act*

From its decision in 1869 in *Paul* v. *Virginia*, 8 Wall. (U.S.) 168 to 1944 this Court consistently held that the business of insurance was not commerce, and was subject to regulation by the states.

*U.S.* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 543-544, and cases cited.

Congress in passing the Sherman Anti-Trust Act in 1890 made no attempt to apply it to insurance. Comprehensive state regulation of insurance although opposed to the Sherman Act was repeatedly upheld by the courts.

*O'Gorman & Young Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251.

*Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313.

*Werth v. Fire Companies Adjustment Bureau*, 160 Va. 845, cert. den. 290 U.S. 659.

Then on June 5, 1944, it was held in a 4-3 decision in the *South-Eastern* case, supra, that a violation of the Sherman Act had been effectively pleaded on the basis of ample allegations in an indictment that aspects of the defendants' insurance business were in interstate commerce, and that the defendants were employing boycott, coercion and intimidation in the furtherance of a conspiracy.

While recognizing that the Sherman Act could apply to the insurance business upon the facts alleged in the *South-Eastern* indictment, this Court placed significant limitations on the type of activities in the business of insurance to which the Sherman Act would apply, and for which the states would be denied the power to regulate. It was stated by the Court at pages 548-549:

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. *And there is a wide range of business and other activities which, though subject to federal regulation are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states.* In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. . . ." (emphasis supplied.)

During the interval before Congress restored to the states the power to regulate the insurance business, several courts applied the limitation described in the *South-Eastern* case in upholding state regulation of various phases of the insurance business.

*Robertson* v. *California*, 328 U.S. 440.

(California criminal statutes requiring an agent for a foreign insurer to be licensed by the state Insurance Commissioner and excluding foreign insurers which did not operate on a legal reserve basis held valid exercises of the police power.)

*Ware* v. *Travelers Ins. Co.*, (C.A. 9) 150 F(2d) 463.

(Idaho statute requiring a foreign insurer to write policies of insurance in Idaho through a resident agent and to pay him a stipulated commission held within the *South-Eastern* exception.)

*First National Beneficial Society* v. *Garrison* (D.C.S.D. Calif.) 58 F.S. 972.

(Cash reserve requirements of California insurance statute for foreign insurers held valid under *South-Eastern* case).

*Mendola* v. *Dineen*, 185 Misc. 540.

(N.Y. statutes providing for the licensing of agents of foreign insurers by the Superintendent of Insurance so as to "best promote the interests of the people of this state" and for the licensing of foreign insurers held valid on the authority of *South-Eastern* case).

Certainly it would appear that even before Congress acted, on the authority of the *South-Eastern* case the activities of the defendants in the case at bar in the negotiation and purchase of a group insurance policy by the Commonwealth for its own employees were so intimately related to local welfare that the Sherman Act would not

apply, even if it is assumed for purposes of argument, that the other elements of a Sherman Act violation were present. In weighing the competing demands of the state and national interests involved, reason and sound principles of comity dictate that a state should have the power to regulate the award of a contract by itself on its own employees.

*B. The McCarran-Ferguson Act.*

In any event, all doubts or questions as to the validity of state regulation of the insurance business were set to rest by the enactment on March 9, 1945 of the McCarran-Ferguson Act (59 Stat. 33; 15 U.S.C. secs. 1011-1015; full text in appendix of this brief). Its title describes it as "An Act to express the intent of the Congress with reference to the regulation of the business of insurance."

In its first sentence the Act states:

> "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, . . ."

Sec. 2 (a) provides:

> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Sec. 2 (b) provides:

> "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any

State for the purpose of regulating the business of insurance, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Congress' purpose in enacting the McCarran Act was obviously to acquiesce in the regulation by the states of the business of insurance. The Sherman Act was not to apply to the business of insurance to the extent that it was regulated by state law. Nothing in the Act requires that the state regulatory law be a facsimile of the Sherman Act.

*Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429-430.
*Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, rehearing denied 349 U.S. 907.
*American Universal Ins. Co.* v. *Sterling* (C.A. 3) 203 F(2d) 159, 163.
*North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange*, (C.A. 8) 181 F(2d) 174, cert. den. 340 U.S. 823.

See: 15 *Contemporary Law and Problems* 473.

Thus in the *Wilburn Boat Co.* case, supra, at page 319, this Court said:

"In the *South-Eastern* case . . . all the opinions had emphasized the historical fact that States had always

been free to regulate insurance. The measure Congress passed shortly thereafter known as the McCarran Act was designed to assure that existing state power to regulate insurance would continue."

In the *North Little Rock Transportation Co.* case, supra, the question of the application of the Sherman Act in the light of regulation of insurance business by state law was squarely raised. It was held that the activities of a group of insurance companies, pursuant to an Arkansas statute authorizing the fixing of insurance rates, were exempt from the Sherman Act by virtue of the McCarran Act. This conclusion was reached although a combination to fix prices is per se a violation of the Sherman Act.

Again the third circuit in construing the McCarran Act in its decision in the *American Universal Ins. Co.* case, supra, stated at page 163, "The McCarran Act changed the rule of that case (i.e. the *South-Eastern* case) and upheld existing and future state systems for regulating the business of insurance . . . ."

The petitioner has failed to offer any decision of this Court, or to indicate any Court of Appeals' decision which supports his construction of the McCarran Act. On the other hand, the decisions which have been cited in this brief are quite consistent with the construction of the act which has been made by the Court of Appeals in this case.

### *C. Regulation of defendants' alleged conduct by Massachusetts law.*

The alleged conduct of the defendants for which the plaintiff claims he is entitled to relief under the Sherman Act consists of their activities in the business of insurance in negotiating for the purchase of a policy of life, accidental death and dismemberment insurance. It is sub-

mitted that these activities were regulated by Massachusetts law, and therefore, by reason of section 2 (b) of the McCarran Act were exempt from the Sherman Act if that law were otherwise applicable. The General Laws of Massachusetts afford a comprehensive body of statutory law regulating the various activities and transactions in the insurance business which are the subject of this complaint.

1. Regulation by General Laws (Ter. Ed.) Chapter 32A.

General Laws (Ter. Ed.) Chapter 32A provided for the adoption of an insurance program for officers and employees of the Commonwealth. By it, the Massachusetts Legislature intended to enact and succeeded in enacting a law to regulate all phases of the business of negotiating the insurance policy for its employees which is the subject of the complaint. Until this chapter was enacted, no group insurance program for such State officers and employees, to the cost of which the Commonwealth would contribute, was possible. Since the Commonwealth had decided to defray part of the cost of the program, it obviously was interested in regulating the entire program. The Commonwealth's Legislature established the state employees' group insurance commission and provided that its members must meet certain requirements. One of its members was the state commissioner of insurance, the official charged by statute with the administration of the state laws regulating the insurance business; another was the Massachusetts commissioner of administration of finance; and the other three were appointees of the governor. That legislation further required the commission to "adopt such reasonable rules and regulations as may be necessary for the administration of this act . . ." (Section 3). Section

4 of the Act directed the commission to "negotiate with and purchase on such terms *as it* deems to be *in the best interest of the commonwealth and its employees*, from one or more insurance companies, savings banks or non-profit hospital and medical service corporations," the group insurance contemplated by the statute; to "execute all agreements or contracts pertaining to said policies of any amendments thereto *for or on behalf* and *in the name of* the commonwealth;" to "negotiate a contract for such term not exceeding three years as it may *in its discretion* deem to be the most advantageous to the commonwealth." (Emphasis supplied) This same section also placed a specific limit on the cost of the premium to be borne by the commonwealth, and it contemplated reinsurance agreements. Since Chapter 32A affords comprehensive regulation of the matters about which the plaintiff complains, the Sherman Act is rendered inapplicable.

*North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange*, supra, (C.A. 8) 181 F(2d) 175, cert. den. 340 U.S. 823.

2. Regulation by General Laws (Ter. Ed.) Chapter 176D.

It is the respondents' position that the defendants' conduct which is the subject of the complaint constituted an insurance transaction which was authorized and regulated by Chapter 32A. But even assuming for purposes of argument that the complaint effectively charges unfair methods of competition on the part of the defendants and that Chapter 32A does not apply, such offensive conduct was still regulated by Massachusetts law and exempt from the Sherman Act.

General Laws (Ter. Ed.) Chapter 176D was enacted subsequent to the adoption of the McCarran Act. The purpose of Chapter 176D is set forth in Section 1 as follows:

> "The purpose of this chapter is to regulate trade practices in the business of insurance *in accordance with the intent of congress as expressed* in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, *all* such practices in this commonwealth which constitute *unfair methods of competition* or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Emphasis supplied).

Section 4 specifically defines certain unfair methods of competition and unfair deceptive acts or practices in the business of insurance.

Section 9 provides:

> "(a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this commonwealth in any method of competition or *in any act or practice* in the conduct of such business which is not defined in section four, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by the commissioner in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon . . ." (Emphasis supplied).

Further provisions of Section 9 outline the procedure for enjoining the continuance of such practices.

Examination of the various sections of Chapter 176D indicates that the Legislature intended to regulate "*all* such practices in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices" in the business of insurance (Section 1). Some restraints of the insurance business and monopolization of any part of it have been specifically defined as unfair methods of competition. The Legislature expressly stated in Section 1 that it intended to regulate *all* trade practices constituting unfair methods of competition. Section 9 would clearly cover any unfair method of competition not defined in Section 4, and provides the remedy to enjoin such methods. Chapter 176D then is the pertinent state regulatory law insulating the defendants' conduct from the operation of the Sherman Act even if it can possibly be concluded that Chapter 32A is inapplicable and that unfair methods of competition have been effectively charged against the defendants.

3. Regulation by other statutory law.

As pointed out in the District Court decision, Massachusetts provides a comprehensive statutory scheme for the regulation of all phases of the insurance business, *General Laws* (Ter. Ed.) Chapters 174A through 178 (R. p. 30). Chapter 175 includes a number of regulatory provisions pertaining to acts of the defendants upon which the plaintiff has relied in his effort to state a claim under the Sherman Act.

This chapter contains numerous provisions on reinsurance including a provision on the status of reinsurance contracts (Sec. 2A), requirements as to the type of companies in which reinsurance can be placed, and limitations on the right of domestic companies to reinsure without the consent of the commissioner of in-

surance (Sec. 20). There are also restrictions on the size of any single risk a company may cover without reinsuring (Sec. 21).

Other provisions define the circumstances in which group insurance policies may be written (Sec. 133), specify the terms that must be contained in them (Sec. 134), and require the approval of their contents by the commissioner (Sec. 134).

Sections 29, 47, Sixth (a) and (d) and 54 furnish a complete answer to the plaintiff's charge that Boston could not legally execute a contract for accidental death and dismemberment insurance since its 1891 charter was never amended to include other classes of insurance than life insurance on the assessment plan (R. p. 18). By virtue of these regulatory sections, Boston was enabled to transact accidental death and dismemberment insurance business without any amendment of its charter.

## II

### The Decision of the Court of Appeals Construing Section 4 of the Clayton Act Is Not in Conflict with Decisions of this Court or Other Courts of Appeals

Relative to this point the Court of Appeals decision was that the plaintiff was not entitled to the treble damage remedy under section 4 of the Clayton Act since the injuries he alleged were remote and speculative (R. pp. 31-32). The plaintiff's claim to fees for servicing the group contract was held to flow indirectly from the commission's failure to award to Minnesota a contract to which it was never legally entitled and it was further held that the plaintiff himself never had any legal right to such fees but only "a mere hope that he would be hired by Minnesota to service the policies and thus be given a chance to earn

the fees" (R. p. 32). As to the plaintiff's claim for the loss of commissions and service fees on future business (R. p. 19), it was held that it was based "only on the expectation that if Minnesota secured this contract with the Commonwealth, its prestige would be increased which might lead to an increase in its business here on which plaintiff might become entitled to fees and commissions" (R. p. 32).

The petitioner does not assert that these holdings are in conflict with any decision of this Court, but charges that they disregard "a recent admonition of this Court" (Pet. pp. 29-31). The decision of this Court, *Radovich* v. *National Football League*, 352 U.S. 445, relied on by the petitioner is in no sense at variance with the holdings of the Court of Appeals for the First Circuit. The *Radovich* case was concerned with the completely different problem of the application of the Sherman Act in the field of professional sports. This Court expressly recognized that the petitioner in that action, in order to avail himself of the remedy under section 4, had to show that he had suffered injury by reason of the alleged violation of the Sherman Act and that he was an aggrieved party. These requirements were met by the allegations of the complaint that the unlawful conspiracy involved a boycott directed against the petitioner for the purpose of preventing him from obtaining employment as a player-coach.

In the case at bar, the gravamen of the Court of Appeals decision is that the plaintiff did not allege the direct injury which was required for relief under section 4. Instead of charging an unlawful conspiracy directed against himself, the plaintiff alleged that the conspiracy was against Minnesota and that "thereby the plaintiff" incurred his alleged injuries (R. p. 9). Obviously, if Minnesota had no legal right to the award of the group contract, which it is alleged it did not receive because of an illegal con-

spiracy, the plaintiff had no legal right to the compensation which he has claimed, and therefore did not incur any injury to his business or property which would permit relief under section 4. For it is fundamental that the "injury" contemplated by section 4 "implies violation of a legal right." *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163.

It is clear that Minnesota did not have a legal right to receive the award of the contract. *General Laws* (Ter. Ed.) Chapter 32A fixed the terms for the award of the group contract. It did not require in any form of language that the contract be awarded to the bidder who offered "the greatest amount of benefits" or even to the lowest bidder. Instead, the award was to be made by the commission on such terms as it deemed to be in the best interest of the Commonwealth and its employees. More appropriate language for an uninhibited exercise of discretion by the commission can hardly be imagined. None of the allegations can be construed as conferring a legal right on Minnesota to receive the award of the group contract, and therefore that company has no cause of action under section 4. Since the plaintiff's right to compensation depends on the legal right of Minnesota to receive the award of the contract, the plaintiff has no legal right to compensation and no remedy under section 4. Any economic loss of Minnesota or the plaintiff as a result of anything forbidden in the anti-trust laws is wholly conjectural and speculative.

As the court as aptly stated it in the case of *A. J. Goodman & Son* v. *United Lacquer Mfg. Corp.*, (D.C. Mass.) 81 F. S. 890, 893, where the plaintiff sought treble damages for the loss of a contract to supply lacquer to the state of New Hampshire, allegedly caused by an anti-trust violation of the defendant in making an unreasonably low bid for the contract, "if as seems to be the case, the

lowest bidder is not assured of the contract, any harm resulting from a violation by the defendant becomes purely speculative."

*Keogh* v. *Chicago & N.W. Ry. Co.*, supra, 260 U.S. 156.
*Okefenokee Rural Electric Membership Corp.* v. *Florida Power & Light Co.*, (C.A. 5) 214 F(2d) 413.
*Hudson Sales Corp.* v. *Waldrip*, (C.A. 5) 211 F(2d) 268.
*A. J. Goodman & Son* v. *United Lacquer Mfg. Corp.*, (D.C. Mass.) supra, 81 F.S. 890.
*Corey* v. *Independent Ice Co.*, (D.C. Mass.) 207 F. 465.
*Admiral Theatre Corp.* v. *Paramount Film Distributing Corp.*, (D.C. Nebr.) 140 F.S. 686.

In addition, as held by the Court below, the plaintiff did not allege any personal legal right to fees for servicing the group contract in question (R. p. 32). There are no averments establishing a legal right of the plaintiff to collect a service fee from the Commonwealth if Minnesota had won the group contract. All that the Commonwealth did was to invite the submission of proposals for the group contracts to the commission. Nothing indicates that it ever agreed, either expressly or impliedly, to pay a service fee to the plaintiff or to any of the persons involved in the eighteen other bids allegedly submitted to the commission (R. p. 12).

The alleged pattern of payment to the plaintiff, when successful, of commissions and/or service fees for "planning, arranging, negotiating and servicing group insurance contracts for employers . . . and acting in their behalf with insurance companies . . ." (R. p. 9) certainly cannot give rise to a legal obligation of the Commonwealth, which is in the position of an employer in this case, to pay the plaintiff a service fee.

In *Cronin* v. *National Shawmut Bank*, 306 Mass. 202, it was held that the plaintiff, an insurance broker, was not entitled to a commission from the defendant where he submitted a proposal for insurance in response to the defendant's invitation, and the defendant awarded the insurance business, on substantially the same terms proposed by the plaintiff, to a second broker, because it wished him to receive a commission. The Supreme Judicial Court said at page 210:

> "A mere indication of a willingness to receive proposals is not an offer which can ripen into a contract upon the submission of a proposal. There is no obligation to accept the most favorable proposal received or to accept any proposal at all. Any or all may be rejected for any reason or without any reason . . ."

Similarly the complaint contains no allegations from which it can be said that Minnesota was under any obligation to pay a service fee to the plaintiff if it had been awarded the group contract. It is simply charged that the plaintiff "decided upon" Minnesota and enlisted its cooperation. These are hardly phrases upon which any contractual obligation of Minnesota to pay a service fee to the plaintiff can be supported.

The decision of the Court of Appeals that the plaintiff's claim of injuries was remote and speculative is even more emphatic when applied to the plaintiff's allegation of damages for loss of "commissions and service fees for new business which would have resulted had said contract been awarded to Minnesota" (R. p. 19). No court could ever hope to assess damages for the vague and illusory losses which the plaintiff has asserted here.

*American Sea Green Slate Co.* v. *O'Halloran*, (C.A. 2) 229 F. 77.

The petitioner's further contention that the decision of the Court of Appeals for the First Circuit on this point is in direct conflict with decisions of Courts of Appeals for other Circuits is without merit.

*Roseland* v. *Phister Mfg. Co.*, (C.A. 7) 125 F(2d) 417 (Pet. pp. 29, 30 and 32) in no way conflicts with the decision in this case. The plaintiff in that action was held to have a remedy under section 4 of the Clayton Act when the defendants, in violation of a Federal Trade Commission cease and desist order, prevented him from selling fire prevention equipment in certain territories where the plaintiff, by virtue of an exclusive agent's contract with one of the defendants of more than fifteen years' duration, had a legal right to bid. In reaching this conclusion the court recognized, at page 419, that there were persons whose injuries were so remote and speculative that they would not be entitled to a treble damage remedy. In this 1942 decision the court cited as authorities for this proposition the cases of *Corey* v. *Independent Ice Co.*, supra, (D.C. Mass.) 207 F. 459 and *Noyes* v. *Parsons*, (C.A. 9) 245 F. 689. The *Roseland* decision is certainly not, as contended by the petitioner, an express rejection of the theory that a plaintiff whose injuries are indirect and speculative may not sue under section 4 of the Clayton Act. The holding and reasoning of that court are quite in line with the First Circuit's decision.

Again there is no conflict between the Seventh Circuit's opinion in *Congress Building Corporation* v. *Loew's Incorporated*, (C.A. 7) 1957 Trade Cases (C.C.H.), par. 68,725 and the decision in the instant case as urged by the petitioner (Pet. p. 31). The *Congress Building Corporation* case is the only one in which a Circuit Court has concluded

that a non-operating lessor of a motion picture theatre under a percentage lease can maintain an action under section 4 of the Clayton Act for injuries allegedly sustained by reason of an anti-trust violation. In the Second and Third Circuits where the same question has arisen, the Courts have denied the treble damage remedy to the lessor.

*Harrison* v. *Paramount Pictures, Inc.*, (D.C.E.D. Pa.) 115 F.S. 312, aff'd. (C.A. 3) 211 F(2d) 405, cert. den. 348 U.S. 828.

*Melrose Realty Co., Inc.* v. *Loew's Inc.*, (C.A. 3) 234 F(2d) 518, cert. den. 352 U.S. 890.

*Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, (D.C.S.D. N.Y.) 30 F.S. 389, aff'd. (C.A. 2) 113 F(2d) 114.

In *Steiner* v. *20th Century-Fox Film Corp.* (C.A. 9) 232 F(2d) 190, the court did not refuse to follow the rule of the *Harrison* case, supra, as erroneously stated by the petitioner (Pet. p. 31), but recognized the validity of the *Harrison* holding and distinguished the *Steiner* facts from those involved in the *Harrison* litigation.

See: *Steiner* v. *20th Century-Fox Film Corp.*, supra, (C.A. 9) 232 F(2d) 190, 193.

In no event is there any conflict between the decisions in the *Congress Building Corporation* and *Steiner* cases, on the one hand, and the decision of the First Circuit in this case. The posture of the plaintiffs in those cases, as far as a direct invasion of their legal rights was concerned, was quite different from that of the petitioner in the case at bar. The reality of this distinction was acknowledged by the Court in the *Congress Building Corpo-*

*ration* case at page 72,959, when it noted the degree of uniformity in denying treble damage relief in a group of cases involving "factually dissimilar situations". One of the cases listed by the Court in this grouping is *Miley v. John Hancock Mutual Life Ins. Co.*, (D.C. Mass.) 148 F.S. 299. The other cases included in this list denied section 4 recovery to creditors, deposed officers of a corporation, a patentee, and a supplier of a victim of an alleged anti-trust violation.

*Gerli v. Silk Ass'n of America*, (D.C. S.D. N.Y.) 36 F(2d) 959.

*Loeb v. Eastman Kodak Co.*, (C.A. 3) 183 F. 704.

*Corey v. Independent Ice Co.*, supra, (D.C. Mass.) 207 F. 465.

*Productive Inventions Inc. v. Trico Products Corp.*, (C.A. 2) 224 F(2d) 678, cert. den. 350 U.S. 936.

*Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, (D.C. Mass.) 147 F.S. 907.

A further clarification of the position of the Court of Appeals for the Ninth Circuit, which decided the *Steiner* case, is found in its decision in *Conference of Studio Unions v. Loew's, Inc.*, (C.A. 9) 193 F(2d) 51, cert. den. 342 U.S. 919. There an injury to a union of movie workers based on an anti-trust violation directed against movie companies to which the union supplied workers was held too remote and incidental to the accomplishment of the alleged illegal object to support a treble damage suit.

On page 32 the petitioner has cited the cases of *Roseland v. Phister Mfg. Co.*, supra, (C.A. 7) 125 F(2d) 417; *Vines v. General Outdoor Advertising Co.*, (C.A. 2) 171 F(2d) 487; *McWhirter v. Monroe Calculating Machine Co., Inc.*, (D.C. W.D. Mo.) 76 F.S. 456 and *Klein v. Sales Builders, Inc.* (D.C. N.D. Ill. 1950-1951 Trade Cases

(C.C.H.) Par. 62,950 as involving plaintiffs in the same position as the petitioner in this case. This is not so, since in each of the cases relied on by the petitioner the plaintiff had a legal right to commissions or salary by virtue of a sales or employment contract, and the alleged anti-trust violation in each case was directed against the plaintiff. In our case the theory of the complaint is that the unlawful conspiracy was directed against Minnesota, and that "thereby the plaintiff" suffered his alleged injuries (R. p. 19). Moreover, as established in this brief, the petitioner never had a legal right to the fees for servicing the group contract or to the ephemeral "commissions and service fees for new business which would have resulted had said contract been awarded to Minnesota" (R. p. 19). The statement by the petitioner that he has not relinquished any interest in his brokerage business as was done by the plaintiffs in the *Melrose Realty Co.* and *Productive Inventions'* cases, supra, is quite meaningless (R. p. 32). His assertion disregards the established fact that he never had any legal interest in the service fees and future commissions for the loss of which his complaint seeks damages. In the absence of any legal right or property interest in such compensation the petitioner, of course, could not relinquish it.

## Conclusion

It is submitted on the foregoing points and authorities that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

The McCarran Ferguson Act

PUBLIC LAW 15—79TH CONGRESS

CHAPTER 20—1ST SESSION

S.340

AN ACT

To express the intent of the Congress with reference to the regulation of the business of insurance.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the ~~several~~ States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of

July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

Approved March 9, 1945.

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JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 256

J. THOMAS MILEY,
*Petitioner,*

*v.*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
*Respondents.*

## BRIEF FOR RESPONDENTS MONARCH LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PAUL REVERE LIFE INSURANCE COMPANY AND JOHN HILL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 1156

J. THOMAS MILEY, PETITIONER,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON MUTUAL LIFE INSURANCE COMPANY, COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, LOYAL PROTECTIVE LIFE INSURANCE COMPANY, MONARCH LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PAUL REVERE LIFE INSURANCE COMPANY, STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER, CLARENCE W. WYATT, EDWARD A. GREEN, ALAN R. WILLISON, JOHN HILL, THEODORE W. FABISAK, JOSEPH A. HUMPHREYS, JOHN M. DEELY, HORACE GOOCH, JR., AND CARL A. SHERIDAN,

RESPONDENTS.

## BRIEF FOR RESPONDENTS MONARCH LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PAUL REVERE LIFE INSURANCE COMPANY AND JOHN HILL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## Statutes Involved

The statutes involved in this case are set forth in relevant part in the Appendix to this brief. They are:

Sherman Anti-Trust Act, 15 U.S.C. § 1 (1952)
Clayton Act, 15 U.S.C. § 15 (1952)
McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014 (1952)
Massachusetts General Laws (Ter. Ed.) c. 32A, §§ 3, 4
Massachusetts General Laws (Ter. Ed.) c. 176D, §§ 1, 2, 3, 5, 9, 12.

## Questions Presented

1. Was the Sherman Act inapplicable to the plaintiff's claim in view of the fact that:

a. The conduct complained of was the negotiation and purchase of an insurance contract by the Commonwealth of Massachusetts from Massachusetts insurance companies for the benefit of state employees,

b. The McCarran-Ferguson Act exempts the business of insurance from the Sherman Act "to the extent that such business is . . . regulated by State law," and

c. The Commonwealth of Massachusetts has established a comprehensive statutory scheme for the regulation of all phases of the insurance business and enacted a statute specifically directing and regulating the negotiation of the contract for its employees?"

2. Was the injury alleged by the plaintiff so indirect, remote and speculative as to bar recovery under the Sherman Act?

## Statement of the Case

Because the petitioner's statement of the case is both misleading and argumentative throughout, there is set forth below a concise statement of the facts which are material to the consideration of the questions presented.

This is an action begun in the United States District Court for the District of Massachusetts in which the plaintiff, an insurance broker, claimed that the several defendants—eight insurance companies, four insurance company officers and the five members of the State Employees' Group Insurance Commission of Massachusetts—engaged in a conspiracy in violation of the Sherman Anti-Trust Act to the injury of the plaintiff.

The complaint alleged that by Mass. St. 1955, c. 628, [Mass. G.L. (Ter. Ed.) c. 32A] provision was made for the establishment of group insurance coverage for state employees, the insurance contract to be negotiated and executed by the State Employees' Group Insurance Commission, an agency which was established by said statute and which was given the responsibility for the administration and supervision of the insurance (A. 9). The defendants Fabisak, Humphreys, Deely, Gooch and Sheridan are members of the Commission (A. 8, 9).

The Commission was directed by section 4 of Mass. G.L. c. 32A to

> "... negotiate with and purchase ... such terms as it deems to be in the best interests of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations, a policy or policies of group life and accidental death and dismemberment insurance covering persons in the service of the commonwealth.

and group general or blanket insurance providing hospital, surgical and medical benefits covering persons in the service of the commonwealth and their dependents, and shall execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth. Said commission may negotiate a contract for such term not exceeding three years as it may in its discretion deem to be the most advantageous to the commonwealth; provided, however, that the portion of the cost of the premium per month to be borne by the commonwealth shall not exceed the estimated monthly cost for which funds have been appropriated by the general court for the then current fiscal year."

The Commission was also directed to "adopt such reasonable rules and regulations as may be necessary for the administration of this act." Mass. G.L. c. 32A, 3.

In November, 1955, the Commission made available to insurance companies and brokers "An Invitation to All Insurance Companies Licensed To Do Business in Massachusetts" which invited the submission of proposals as set out in the publication, the proposals to be submitted on or before December 1, 1955 (A. 10).

The complaint further alleged that Miley submitted a proposal on behalf of Blue Cross, Blue Shield and Minnesota Mutual Life Insurance Company, a Minnesota corporation (A. 10, 11). Under Miley's proposal, Minnesota Mutual was to provide the life and accidental death and dismemberment coverage for the state employees' policy (A. 11). The premium cost of that coverage was lower than that set forth in any of the proposals submitted by other companies prior to December 1, 1955, including a proposal submitted jointly by all of the defendant Mas-

sachusetts companies except Boston Mutual Life Insurance Company (A. 12).

The complaint averred that after the Commission had determined that the life and accidental death and dismemberment premium suggested in the Miley proposal was the lowest submitted, the members of the Commission met with representatives of the defendant companies, including the officers who are defendants here, and undertook to devise some method by which the Massachusetts companies might reduce their premium to that proposed by Minnesota Mutual (A. 12, 13). The plaintiff alleged that this undertaking by the Commission and the representatives of the Massachusetts companies was "part of the conspiracy to eliminate MINNESOTA as a competitor and discourage it from continuing to solicit business in Massachusetts" (A. 14, 15). There was no allegation that the contract obtained by the Commission was not in fact in the best interests of the Commonwealth, or that the Commission did not "deem it to be" so. Mass. G.L. c. 32A, § 4.

As the complaint stated, the Massachusetts companies through the cooperation and assistance of the defendant Boston Mutual Life Insurance Company were able to reduce their premium for the life and accidental death and dismemberment coverage to the figure proposed by Minnesota Mutual, and the contract provided for by Mass. St. 1955, c. 628 was executed by the Commission with Boston Mutual which reinsured 95% of the insurance with the other defendant Massachusetts companies (A. 16-18). The plaintiff claimed that this contract was illegal and void, and that the Commission should have entered into a contract with Minnesota Mutual (A. 18).

Minnesota Mutual was not a party to this action. However, the plaintiff alleged that if the Commission had awarded the contract to Minnesota Mutual, the award would have improved Minnesota Mutual's competitive posi-

tion and that because of the failure to award the contract to Minnesota Mutual "the plaintiff MILEY was deprived of compensation for servicing said contract and commissions and service fees for new business which would have resulted had said contract been awarded to MINNESOTA, to the amount, as MILEY says, in the sum of TWO HUNDRED AND EIGHTY THOUSAND DOLLARS ($280,000)" (A. 19).

The plaintiff did not claim damages resulting from the loss of a commission on the Massachusetts state employees' contract itself. Nor did the plaintiff allege any agreement which entitled him to service the contract or any part thereof for Minnesota. While he alleged that his gross income from servicing the Massachusetts contract and from new business which he might have obtained would have been $280,000, the plaintiff nowhere stated what lost profit he claimed to have suffered.

The defendants' motions to dismiss the complaint were allowed by the District Court (A. 33), and that order was affirmed *per curiam* by the Court of Appeals for the First Circuit (A. 36) upon the memorandum of decision issued by the District Judge (A. 28-33).

## Summary of Argument

The District Judge, in dismissing the complaint, stated six separate and independently sufficient grounds for his action (A. 28-33). They were:

> (1). That the conduct complained of was "done in the course of negotiation authorized and regulated by an applicable state law [Mass. G.L. c. 32A], and as to such transactions Congress has expressly provided [in the McCarran-Ferguson Act] that the Sherman Act shall not apply."

(2) That the transaction in question was also regulated by other laws of Massachusetts [G.L. c. 176D and 174A through 178] and therefore removed from the application of the Sherman Act.

(3) That on the facts alleged in the complaint it could not be said that in awarding the insurance contract as it did the Commission violated any rights of Minnesota Mutual; *a fortiori* it effected no rights of the plaintiff.

(4) That the injuries alleged in the complaint were too indirect to entitle him to bring this action.

(5) That the injuries alleged by the plaintiff were too speculative to support his action.

(6) That "the Sherman Act does not apply to the activities of a state or to the activities of its officers directed by the state legislature."

The plaintiff's petition for a writ of certiorari is devoted almost exclusively to the first two of these six grounds. Brief consideration is given to the fourth and sixth grounds, but nowhere in the petition does the plaintiff dispute the validity of the third and fifth grounds, namely, that no interference with legal rights of the plaintiff was alleged, and that the injuries alleged were too speculative to permit recovery.

The defendants do not for a moment concede that in deciding any of the issues which were considered in the petition, the Court of Appeals—which affirmed and adopted the District Judge's memorandum of decision (A. 36)—determined any question which should be decided by this Court or conflicted with any decision of this Court or of another court of appeals. However, even if it should be assumed, *arguendo*, that the application of the McCarran-

Ferguson Act in the particular situation is an important question which should be decided by this Court, it is still too clear to permit reasonable argument to the contrary that the other separate and independent grounds of the Court of Appeal's decision, which were considered either perfunctorily or not at all in the petition, present no such question and that each such ground would alone preclude a reversal of the Court of Appeal's decision. Accordingly, no determination which this Court might make with respect to the McCarran-Ferguson Act would have any effect upon the disposition of the case.

## Argument

I. The Complaint Failed to State Any Violation of the Sherman Act.

A. *The Sherman Act is Not Violated by Acts of a State Agency Duly Authorized by Statute.*

The Sherman Act is not violated by acts authorized and regulated by state statute. As this Court said in *Parker v. Brown*, 317 U.S. 341, 350-352:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

> "The state in adopting and enforcing the prorate [marketing] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as a sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen* v. *Smith*, 195 U.S. 332, 344-45; cf. *Lowenstein* v. *Evans*, 69 F. 908, 910."

Similarly, the conduct of the Massachusetts State Employees' Group Insurance Commission seems clearly to be outside the scope of the Sherman Act as interpreted by the Supreme Court. The instructions to the Commission in Mass. G.L. c. 32A were clear. The Commission was directed to "negotiate . . . and purchase [group insurance] on such terms as it deemed to be in the best interest of the Commonwealth and its employees." The statute did not require the Commission to invite bids and accept the lowest one. Instead the Commission was instructed to "negotiate a contract" and, for that purpose and others, to "adopt such reasonable rules and regulations as may be necessary for the administration of this Act." As is stated in 10 McQuillin, *Municipal Corporations* § 29.73:

> ". . . Where bids are requested but there is no law requiring a competitive bid nor that the contract be awarded to the lowest bidder, . . . the contract need not be let to the lowest bidder."

Even where the public body is required by statute to publish an invitation for proposals, it is clear that there is no implied requirement that the lowest bid must be accepted. *Mayo* v. *County Commissioners of Hampden*, 141 Mass. 74, 6 N.E. 757 (1886). In that case, the Court said at page 75:

> "It is clearly the intention of the Legislature that the county commissioners, after inviting competition by public notice, shall have the authority to make such contracts as in their judgment the best interests of the county require."

The best interests of the public are not always served by considering price alone. Other "factors such as judgment, skill, ability, capacity and integrity" are also important. *Friend* v. *Lee*, 221 F.2d 96, 100 (D.C. cir. 1955).

The discretion of the public agency is particularly broad where, as in the present case, the agency is instructed to enter into a contract which it deems to be for the best interests of the community. *Interstate Power Co.* v. *Incorporated Town of McGregor*, 230 Iowa 42, 296 N.W. 770 (1941). As the Court said in *Slocum* v. *Medford*, 302 Mass. 251, 254, 18 N.E.2d 1013 (1939):

> "The court can interfere only where it is shown that the officer or officers charged with the duty of making the decision have acted corruptly or in bad faith or so unreasonably or arbitrarily as to be guilty of a plain abuse of discretion."

Reduced to its essentials the plaintiff's claim is that the defendant members of the State Employees' Group Insurance Commission undertook, through the process of inviting proposals, to determine the optimum insurance benefits which could be obtained for the state employees with the funds appropriated for that purpose and then, having settled on the benefits which could be obtained, went to the defendant Massachusetts life insurance companies writing group insurance and offered to award the state contract to them if they would supply the benefits for the available premium. There was nothing further in the complaint ex-

cept immaterial allegations intended to discredit the defendants and the bare allegation that the purpose of the defendants' cooperative efforts was "to eliminate Minnesota as a competitor and discourage it from continuing to solicit business in Massachusetts" (A. 14, 15).

Even accepting as true the allegations of the complaint, it is obvious that the course of action followed by the Commission, involving ultimately the cooperation of the defendant corporations, resulted inevitably in accomplishing the very purpose for which the Commission was constituted, namely, to negotiate the best possible group insurance contract for the state employees. By inviting proposals, the Commission learned the optimum coverage and premium rate which could be obtained. By persuading the Massachusetts companies to provide that coverage at that rate, the Commission assured the state employees of the availability of service facilities which clearly could not be matched by any single company and certainly could not be approached by a single foreign insurance corporation.

The plaintiff nowhere has denied that the coverage and premium rate under the contract negotiated by the Commission with Boston Mutual matched those provided in his own proposal. Nor, in fact, has he denied that the local service facilities of the combined domestic companies far surpass any which could be provided by Minnesota Mutual or any other foreign company.

It cannot be doubted that in using the low bid of Minnesota Mutual as a basis upon which to negotiate with the Massachusetts companies, the Commission was acting within the scope of the authority given it by Mass. G.L. c. 32 A. Accordingly, as the Supreme Court plainly stated in *Parker v. Brown*, 317 U.S. 341, 350-352, the conduct of the Commission was not governed by the Sherman Act and the plaintiff can maintain no action based thereon.

B. *The Acts Complained of Were Regulated by the Massachusetts Legislature and Therefore Under the McCarran-Ferguson Act Their Users Were Exempt from the Scope of the Sherman Act.*

The plaintiff makes it obvious in his petition that his case for certiorari is based almost exclusively on the assertion that the application of the McCarran-Ferguson Act to this action presents a novel and important question of federal law. As has already been pointed out, the decision of the courts below was based upon, and required by, other independent grounds, and it is strongly urged that this Court should deny the writ for that reason alone. However, a careful reading of the McCarran-Ferguson Act and of the decisions of this and other courts interpreting it, makes it clear that the application of the Act in the present action has presented neither a novel nor, indeed, a substantial question of law.

The McCarran-Ferguson Act (15 U.S.C. §§ 1011-15), enacted by Congress on March 9, 1945, is singularly clear and unambiguous.

It provides, in relevant part:

> "[§ 1011] Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

> "[1012] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"[ 1013. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914 known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof."

This Court's interpretation of the purpose of the McCarran-Ferguson Act was stated succinctly in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319:

"In the South-Eastern case [*United States v. South-Eastern Underwriters Association*, 322 U.S. 533] all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter known as the McCarran Act was designed to *assure that existing state power to regulate insurance would continue.*" (Emphasis added)

Similarly, in *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, this Court said of the Act at pages 429-431:

"Obviously Congress' purpose was broadly to give support to the *existing and future* state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects. Moreover in taking this action Congress must have had full knowledge of the nationwide existence of state systems of regulation and taxation: of the fact that they differ greatly in scope and character of the regulations imposed; . . .

"But, though Congress had no purpose to validate unconstitutional provisions of state laws . . . it clearly put the full weight of its power behind *existing and future* state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." (Emphasis added)

To the same effect are *American Universal Ins. Co. v. Sterling*, 203 F.2d 159 (3d cir. 1952); *North Little Rock Transp. Co. v. Casualty Reciprocal Exchange*, 181 F.2d 174 (8th cir. 1950), cert. den. 340 U.S. 823; *State v. Prudential Insurance Co.*, 223 Ind. 198; 64 N.E. 2d 150 (1945), aff'd without opinion 328 U.S. 823; *American Hospital & Life Insurance Co. v. Federal Trade Commission*, 243 F.2d 719, (5th cir. 1957); *National Casualty Co. v. Federal Trade*

*Commission*, 25 U.S. Law Week, (6th cir. June 6, 1957).

The plaintiff has attempted to graft onto the express terms of the McCarran-Ferguson Act a provision which is obviously the basic premise upon which his argument rests but which also is plainly unsupportable. That provision, in his own words, is as follows:

> "... they [the states] were required to act affirmatively and to give the public the same protection in the insurance field which the Sherman Act gives in every other field" (Pet. 20).
>
> "... In the absence of such legislation the business of insurance in these thirty-two states including Massachusetts, is subject to the provisions of the Sherman Act" (Pet. 23).
>
> "... The 'omnibus' clause in the Act [Mass. G.L. c. 176D, § 3] creating an administrative procedure cannot fill the void caused by the failure to enact legislation establishing compensatory, corrective or punitive machinery such as is provided by the Sherman and Clayton Acts."

The plaintiff's interpretation of the McCarran-Ferguson Act is clearly unsupportable.

1. The Plain Language of the Act.

The plaintiff argues in effect that unless a state has duplicated the Sherman and Clayton Acts by statutes of its own, the Sherman and Clayton Acts are applicable to insurance practices and transactions in that state. The answer to the argument is obvious. To adopt the plaintiff's interpretation would render nugatory the very clear and explicit intention of Congress that "the continued regula-

tion and taxation by the several states of the business of insurance is in the public interest. . . ." 15 U.S.C. 1011. Certainly no rational purpose would have been accomplished by exempting the business of insurance from the operation of federal regulatory laws only upon the condition that the states, to whom the responsibility of regulation was delegated, should adopt the same laws.

There is no ambiguity in the McCarran-Ferguson Act. After affirming the basic intent of Congress that the regulation of insurance is best left to the states, the Act provided an exception to the principle of exclusive state regulation. Congress specified that although for a period of almost three years the Sherman, Clayton and Federal Trade Commission Acts would not be applicable at all, after January 1, 1948 they would apply to the business of insurance "to the extent that such business is not regulated by state law." 15 U.S.C. 1012(b).

The Commonwealth of Massachusetts has availed itself of the opportunity afforded by Congress. It has enacted a comprehensive statutory scheme for the regulation of all phases of the insurance business (Mass. G.L. c. 174A through 178) and has provided in Mass. G.L. c. 32A *specific* directions and regulations governing the writing of the group insurance for state employees. Moreover, Mass. G.L. c. 176D is expressly designed to appropriate to the state government the regulatory function sanctioned by the McCarran-Ferguson Act. Chapter 176D states in Section 1 that:

> "The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, *all* such practices

in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Emphasis added)

Section 4 of the chapter defines certain unfair or improper methods of competition in the business of insurance. In addition, Section 9 provides remedies:

"(a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this commonwealth in *any* method of competition or in *any* act or practice in the conduct of such business which is not defined in section four, that such method of competition is unfair or that such act or practice is unfair or deceptive. . . ." (Emphasis added)

These provisions, taken alone or in conjunction with Chapter 32A, clearly evidence an intention on the part of the Commonwealth of Massachusetts to regulate the conduct of negotiations leading to the writing of insurance contracts in general and of this insurance contract in particular. Accordingly, under the plain language of the McCarran-Ferguson Act, the Sherman Act is not applicable.

2. The Legislative History of the McCarran-Ferguson Act.

At pages 17-20 of his petition, the plaintiff has quoted at some length from the House Report (H.R. Rep. No. 143, 79th Cong., 1st Sess., p. 3) and the Senate Debates with respect to the McCarran-Ferguson Act. What he has quoted tends in no way to weaken or avoid the conclusion of the courts below that in enacting Mass. G.L. c. 32A the Mas-

sachusetts legislature was regulating the business of insurance and, accordingly, the defendants' negotiations pursuant to Chapter 32A were not subject to the Sherman Act. However, the plaintiff has omitted from the excerpts quoted in the petition a statement from Senator McCarran which leaves no doubt as to the matter:

> "Mr. Ellender. At the end of the three year period will the taxing and regulatory powers of the states be in any way effected should the Congress not take any action at all?
>
> "Mr. McCarran. No they will not be effected." (91 Cong. Rec. 1442 (1945)).

II. The Plaintiff Alleged No Injury to His Business or Property Which Would Support His Action.

A. *No Private Rights Were Infringed by Refusal of Minnesota Mutual's Bid.*

As has been pointed out above, nothing in Mass. G.L. c. 32A required the Commission to invite bids or, having invited them, to accept the lowest. However, even if one assumes that Minnesota Mutual's bid was the "lowest" submitted, and that the Commission was obligated by law to accept it, still the rejection of the bid resulted in no legally cognizable injury, either to Minnesota Mutual or to the plaintiff. The law recognizes no private right to the award of a government contract. As this Court said in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126-128:

> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the

protection of sellers and confers no enforceable rights upon prospective bidders.

". . . That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of *litigable rights upon those desirous of selling to the Government*; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain." (Emphasis added)

Accordingly, since no private rights were infringed by the rejection of Minnesota Mutual's bid, there was no legal *injury* to the "business or property" of the plaintiff and, therefore, no right of action under the Clayton Act. "Injury implies violation of a legal right." *Keough v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163.

B. *The Injury To The Plaintiff, If Any, Is Too Indirect and Speculative to Permit Damages to Be Awarded In this Action.*

The only damages alleged by the plaintiff, a broker, were loss of an undetermined amount of service fees on this contract (not loss of a commission on the sale), and other gross income from possible new business of an unspecified amount, the total allegedly being $280,000 gross income (A. 19). No loss of net profit was alleged.

Nowhere in his complaint in the present case did the plaintiff allege that any of the acts of which he complained were done for the purpose of harming him. On the contrary, in attempting to invoke application of the Sherman

Act, he stated repeatedly that the sole purpose of the defendants was "to eliminate MINNESOTA as a competitor and discourage it from continuing to solicit business in Massachusetts" (A. 14, 15). (Emphasis added). If Miley suffered any injury as a result of the conduct which he claimed was directed at Minnesota Mutual, his injury was purely incidental and cannot form the basis of an action for treble damages.

In *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th cir. 1951), it was held that the plaintiff labor unions and members thereof were not entitled to recover treble damages from the defendant motion picture studios who engaged in a conspiracy with a union which directly resulted in the discharge of the plaintiff employees but which had for its purpose elimination of certain other studios as competitors. The Court said at page 54:

> "The reasoning of the courts in the cases . . . is that the conspiracy to restrain competition was directed at the corporation and the damage suffered by the plaintiff was merely incidental. So, in the present case, insofar as the conspiracy was to restrain trade by destroying competitors it was directed at the Independents, and the alleged damage the appellants suffered therefrom was incidental to the accomplishment of the illegal object."

This rule has been developed in a series of cases which have held that shareholders and officers of corporations, creditors and landlords, and even individual partners in a partnership, have no standing to sue for treble damages. *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d cir. 1910); *Berli v. Silk Association of America*, 36 F.2d 959 (S.D. N.Y. 1929); *Corey v. Boston Ice Co.*, 207 Fed. 465 (D. Mass.

1913); *Westmoreland Asbestos Co. v. Johns Manville Corp.*, 30 F. Supp. 389 (S.D.N.Y. 1939) aff'd 113 F.2d 114.

The rule that no recovery may be had for remote injury, even if certain to flow from an injury directly caused, also has been held to bar recovery by the lessor of a theater on a percentage type lease where the lessee's business (and therefore the lease payments) were allegedly reduced by defendant's anti-trust violation. *Harrison v. Paramount Pictures*, 115 F. Supp. 342 (E.D. Pa. 1953) aff'd 211 F.2d 405, cert. den. 348 U.S. 828; *Melrose Realty Co., Inc. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir. 1956) cert. den. 352 U.S. 890.

Even the owner of a patent licensed on a royalty-per-unit-sold basis cannot recover for sales which its licensee was allegedly prevented from making because of anti-trust violations. *Productive Inventions v. Trico Products Corp.*, 224 F.2d 678 (2nd cir. 1955) cert. den. 350 U.S. 936. The Court held that the injury to the plaintiff was too remote, stating at page 679:

> "Those harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed or who have been directly harmed may recover."

The speculative nature of Minnesota Mutual's injury was, of course, compounded in the case of Miley. He claimed lost service fees on the Massachusetts state employees' contract and lost commissions and service fees on new business which allegedly would have resulted if the contract had been awarded to Minnesota Mutual (A. 19). However, he did not allege that he was the exclusive or even a regular agent of Minnesota Mutual. Even if he were, neither the insured nor the insurer have a legal obligation to place the servicing of a policy with the original

broker in the absence of a contract to do so. See *Cronin* v. *National Shawmut Bank*, 306 Mass. 202, 27 N.E.2d 717 (1940). Thus, even if the plaintiff could establish an amount of interstate business which Minnesota Mutual allegedly lost as an incidental result of the awarding of this contract, he could not show that any particular part of it would have accrued to his account. It is this fact, among others, which clearly distinguishes the cases upon which the plaintiff based his claim that there is a conflict between the courts of appeal. In each of the cases upon which the plaintiff relied, there was a *contract* between the principal and agent, and the agent's claim of injury was predicated on and measured by his contract.

In summary, the plaintiff's claim to damages was based upon (a) an unspecified portion of the service commissions which he might have obtained from a company which might or might not have been awarded the particular contract, and (b) an indeterminable percentage which he might have negotiated of the new business which Minnesota Mutual might have obtained as a result of being awarded the state employees' contract. Both bases were extremely speculative. Accordingly, what Mr. Justice Brandeis said for this Court in *Keough* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 165 is equally appropriate here:

> "... damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us."

## Conclusion

Since this case presents no question to which a clear answer has not already been provided by Congress, this Court and the uniform decisions of the Courts of appeal, the petition for writ of certiorari should be denied.

Respectfully submitted,

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## Appendix

Sherman Anti-Trust Act, 15 U.S.C. §1 (1952)

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: . . .

Clayton Act, 15 U.S.C. §15 (1952)

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The McCarran-Ferguson Act, 15 U.S.C. §§1011-1014 (1952)

> [§1011] Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> [§1012] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, un-

less such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law:

[§1013] (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

[§1014] Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Massachusetts General Laws (Ter. Ed.) Chapter 32A, §§3, 4.

§3. State Employees' Group Insurance Commission; Members, Executive Secretary; Rules and

Regulations. — There shall be established within the commission on administration and finance, but not under its jurisdiction, a special unpaid commission, to be known as the state employees' group insurance commission, consisting of the commissioner of administration, the commissioner of insurance, and three members to be appointed by the governor, with the advice and consent of the council. At least one member appointed by the governor shall be a state employee, and not more than two appointive members of the commission shall be members of the same political party. No member appointed by the governor shall be an insurance agent, broker, employee or officer of any insurance company. Upon the expiration of the term of office of any appointive member, his successor shall be appointed in like manner for a term of three years. The commission shall be provided with suitable offices in the state house and may, subject to appropriation, incur expenses and appoint an executive secretary and such other employees as may be necessary to administer the provisions of this chapter. There shall be paid by the commonwealth to each appointive member of said commission the necessary expenses actually incurred in the discharge of his official duties. The executive secretary shall be the executive and administrative officer of the commission and shall not be subject to the provisions of chapter thirty-one. The commission shall adopt such reasonable rules and regulations as may be necessary for the administration of this act and shall make an annual report to the governor and to the general court which shall be in such form as to enable employees to understand the benefits available from the insurance program, including the cost thereof. (1955, 628, §1, approved Aug. 3, 1955; effective 90 days thereafter. Section 4 of the Act reads as follows:

Section 4. The three members initially appointed by the governor to the special unpaid commission established by section three of chapter thirty-two A of the General Laws, as appearing in section one, shall be appointed for terms of one, two and three years, respectively.)

§4. Insurance Policies, etc. — The commission shall negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations, a policy or policies of group life and accidental death and dismemberment insurance covering persons in the service of the commonwealth, and group general or blanket insurance providing hospital, surgical and medical benefits covering persons in the service of the commonwealth and their dependents, and shall execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth. Said commission may negotiate a contract for such term not exceeding three years as it may, in its discretion, deem to be the most advantageous to the commonwealth; provided, however, that the portion of the cost of the premium per month to be borne by the commonwealth shall not exceed the estimated monthly cost for which funds have been appropriated by the general court for the then current fiscal year.

For the purposes of this chapter, any savings bank authorized to engage in the insurance business in accordance with chapter one hundred and seventy-eight and any non-profit hospital service corporation or non-profit medical corporation organized under chapter one hundred and seventy-six A or one hundred and seventy

six B shall be and is hereby authorized to enter into a reinsurance agreement as herein provided in the same manner as any other insurance company. (1955, 628, §1, approv. Aug. 3, 1955; effective 90 days thereafter.)

Massachusetts General Laws (Ter. Ed.) Chapter 176D, §§1, 2, 3, 5, 9, 12

§1. The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

§2. When used in this chapter —

"Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters.

"Commissioner" shall mean the commissioner of insurance.

§3. No person shall engage in this commonwealth in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

§5. The commissioner shall have power to examine and investigate into the affairs of every person engaged

in the business of insurance in this commonwealth in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section three.

§9. (a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this commonwealth in any method of competition or in any act or practice in the conduct of such business which is not defined in section four, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by the commissioner in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section six. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this chapter and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general, at any time after thirty days after the service of such report cause a petition to be filed in the supreme judicial court to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue

such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite.

(c) A transcript of the proceedings before the commissioner, including all evidence taken and the report and findings, shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceedings by the commissioner with respect thereto are to the interest of the public and that the findings of the commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

§12. The powers vested in the commissioner by this chapter shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

Office Supreme Court, U.S.
FILED
AUG 7 1957
JOHN T. FEY, Clerk

No. [illegible]

IN THE

# Supreme Court of the United States

October Term, 1957

J. THOMAS MILEY

PETITIONER,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF FOR THE RESPONDENTS STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER AND ALAN R. WILLSON, IN OPPOSITION

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August 5, 1957

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IN THE

# Supreme Court of the United States

October Term, 1957

J. THOMAS MILEY

PETITIONER

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF FOR THE RESPONDENTS STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER AND ALAN R. WILLSON, IN OPPOSITION

## OPINIONS BELOW

The Memorandum Opinion of the District Court (A 28-33) is reported in 148 F. Supp. 299. The *per curiam* opinion of the Court of Appeals for the First Circuit (A 36) is reported in 242 F.2d 758.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

The question here is whether the complaint, under any interpretation, states a cause of action for treble damages under Section 1 of the Sherman Act and Section 4 of the Clayton Act (15 U.S.C. §§ 1, 15, appearing p. 3 of the Petition).

The petitioner, a Massachusetts insurance broker, alleges that the five members of the Massachusetts State Employees Group Insurance Commission (including the Massachusetts Commissioner of Insurance), and certain Massachusetts insurance companies and their officers, conspired to restrain trade by causing one group insurance contract upon the lives of Massachusetts state employees to be awarded to a Massachusetts company rather than to the Minnesota company represented by the petitioner. It appears that the contract awarded by the Massachusetts Commission to the local company contained terms no less favorable to the state and its insured employees than those offered by the Minnesota company which the petitioner represented.

In its Memorandum of Decision granting Defendants' Motion to Dismiss (A. 28-33), the District Court held that the petitioner's action was barred by the provisions of the McCarran-Ferguson Act (see pp. 3, 4, *infra*), by the principle that state action is not subject to the Sherman Act, and by the petitioner's failure to allege facts showing injury to his own property or business as required by Section 4, Clayton Act, 15 U.S.C. § 15 (Petition, p. 3).

With equal correctness the District Court could have dismissed the complaint on the ground that it did not sufficiently allege a violation of the Sherman Act in

view of the absence of facts showing economic harm to the public at large, or any segment thereof, or any appreciable or substantial effect on the free flow of interstate commerce. The purported "conspiracy" related to a single isolated transaction.

The case does not raise the sweeping questions set forth in the petitioner's Petition for a writ of certiorari (pp. 2-3, *et seq.*). The McCarran-Ferguson Act is but one of several equally conclusive grounds for dismissal, and the Act's application here is limited to the uncommon situation where the state itself is a party — indeed, the principal party — to conduct which purportedly violates the Sherman Act. In any event, with or without reference to the McCarran-Ferguson Act, the complaint fails to set forth a claim cognizable under the anti-trust laws. Furthermore, the unique facts of this case are such as to make it of little, if any, importance as a precedent.

## STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15 are set forth on page 3 of the Petition.

The McCarran-Ferguson Act is set forth in part on page 3 of the Petition and reads in its entirety as follows:

> "[§ 1011] Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"[§ 1012] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"[§ 1013] (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"[§ 1014] Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920."

The Massachusetts statutes referred to herein are contained in Appendix A to the Petition, except that Massachusetts General Laws (Ter. Ed.) Chapter 175, § 54(c), 47(Sixth) appear in the Appendix to this brief.

## STATEMENT

This case arises upon the *per curiam* affirmance by the Court of Appeals of an order of the District Court granting the respondents' motion to dismiss.

The District Court rendered its order and written decision eleven days after argument, and the Court of Appeals affirmed *per curiam* three days after hearing.

The facts set forth in the complaint fail to make out anything more than a private grievance for which the federal anti-trust laws provide no remedy. These facts are as follows:*

The petitioner is a licensed insurance broker and "group insurance administrator." (Par. 4.) He negotiates and services group insurance contracts, and acts for employers in their dealings with insurers. The petitioner's compensation, "if successful in his efforts", consists of commissions for placing and fees for servicing the business (Par. 4).

During 1955, the Massachusetts Legislature enacted General Laws, Chapter 32A, providing life, accidental death and dismemberment, hospital, surgical and medical group insurance for approximately 32,000 Massachusetts state employees (Par. 5). To obtain the insurance and administer the program, the statute established the five-member State Employees Group Insur-

*References are to paragraphs of the complaint, appearing on page A6 through A20 of the Petitioner's Record Appendix.

ance Commission, the members of which are defendants herein (Par. 3). The Commission was required by statute to,

> "*negotiate with* and purchase, on such terms as it deems to be in the best interest of the Commonwealth and its employees, from one or more insurance companies . . . a policy or policies of group life and accidental death and dismemberment insurance . . . G.L. (Ter. Ed.) c. 32A, § 4. (Emphasis supplied.)

In November 1955 (although not required by law to do so) the Commission published and circulated an invitation for bids or proposals from insurance companies licensed to do business in Massachusetts. All such bids or proposals were to be received by the Commission before 5:00 P.M. on December 1, 1955 (Par. 6).

In response to this invitation, the petitioner "enlisted the cooperation" of three insurers, namely, Minnesota Mutual Life Insurance Company (a Minnesota corporation) and Massachusetts Hospital Service, Inc. ("Blue Cross"), and Massachusetts Medical Service ("Blue Shield"), and he submitted a "package" bid providing (1) life and accidental death and dismemberment coverage by Minnesota, and (2) hospital, surgical and medical coverage by Blue Cross-Blue Shield (Pars. 8, 9). This "package bid" allegedly embodied greater benefits for a three-year contract term than were offered by any other bidders *who submitted bids on or prior to December 1* (Pars. 10, 11) (emphasis supplied). With respect to the life and accidental death and dismemberment coverage, Minnesota Mutual's bid allegedly had a lower premium cost than was proposed by the defendants Hancock, Columbian, Loyal, Monarch, New England, Revere and State in a separate joint bid submitted prior to December 1, 1955 in the

name of "Massachusetts Life Insurance Companies." (Par. 11.) Nineteen bids were submitted to the Commission (Par. 12).

After preliminary bids were in, the five members of the Commission allegedly "conspired" with the other defendants to prevent the award of the life and accidental death and dismemberment portion of the business to Minnesota, and to award it instead to the Massachusetts companies (Par. 13). The Commission members asked a representative of Blue Cross and Blue Shield if these companies would offer the same hospital, medical and surgical benefits in cooperation with a life insurance company other than Minnesota, and he replied that Blue Cross and Blue Shield would, provided the premium rate of the other company did not exceed 90¢ per thousand (Par. 14).

"The defendants then proceeded to devise ways and means for the 'Massachusetts Life Insurance Companies' to *meet* the Minnesota bid." (Par. 14.) (Emphasis supplied.) The different defendant insurance companies sought "a proposed plan which would provide ways and means of meeting or bettering said low bid of NINETY CENTS (90¢) . . ." (Par. 15.)

Ultimately, the Massachusetts companies were able to offer the 90¢ rate by joining with the defendant Boston Mutual Life Insurance Company, a company which had not participated in the earlier proposals of the Massachusetts companies. Certain of the defendants agreed to loan to Boston a number of trained employees to establish a proper department for carrying on the work involved (Par. 10). The contract for group life and accidental death and dismemberment was then awarded by the Commission on December 30,

1955, to Boston at the 90¢ rate, the other defendant companies acting as reinsurers of 95% of the total amount of insurance covered by the contract (Par. 20).

Up to and including the date of the awarding of the contract to Boston, it is alleged that Boston could not legally execute a contract for accidental death and dismemberment insurance because its charter permitted it to conduct "only life insurance on the assessment plan," and was never amended to include other classes of insurance (Par. 21). However, as a matter of statutory law this irrelevant allegation does not accurately state the applicable Massachusetts statutes. See Appendix, *infra*.

The complaint concludes with the allegations that the defendant companies and their executives desired that they, rather than Minnesota, should get the business, which carried with it considerable prestige (Par. 22); and that solely as a result of the defendants' actions; Minnesota failed to receive the award of the contract and the petitioner was deprived of compensation for servicing the contract and commissions and service fees for new business which would have resulted (Par. 23). (The petitioner does not allege that he would have received any commission on the state employees' business.)

It appears that the petitioner is complaining primarily of the defendants' efforts during December of 1955 to cause the Massachusetts companies to lower their bid. The "conspiracy" consists of the Commission's diligent and successful efforts to obtain low-cost insurance from a company with main offices and servicing facilities located nearer than in Minnesota.

As a result of the purported "conspiracy", the state employees were benefited. Competitive conditions in the insurance business were unaffected. Except for this isolated transaction, it is not alleged that the business of Minnesota Mutual (which is not a party here), or of the petitioner, was or would be curtailed in Massachusetts or elsewhere.

The petitioner seems to believe that the Commission was required to adhere to a system of strict competitive bidding. This is not so. The statute creating the Commission required it to "negotiate" with the prospective insurers. G. L. (Ter. Ed.) c. 32A §4 (Appendix A to Petition, p. 38), which is exactly what the Commission did. The competitive freedom which the Sherman Act is supposed to foster would be threatened if a purchaser were not allowed to confer informally with a likely supplier in an effort to obtain the best bargain.

## ARGUMENT

Seventeen pages of the Petition are devoted to a discussion of the McCarran-Ferguson Act, and to the mistaken contention that the decision of the District Court involves "for the first time in this Court the question of the extent to which the states may regulate the business of insurance under the permission granted by the McCarran-Ferguson Act . . . in order to foreclose Federal jurisdiction of an action for treble damages for a violation of the Sherman Act." (Petition, p. 5.)

The petitioner ignores (1) that this case at most involves application of the McCarran-Ferguson Act to the possible antitrust aspects of a state's own purchase of insurance—a matter of little recurring significance, and (2) that there are at least three equally persuasive

grounds, hereinafter discussed, for dismissing the complaint. These latter are wholly independent of the McCarran-Ferguson Act and raise no novel or important issue of law.

## I.

### No Difficult or Important Question with Respect to the McCarran-Ferguson Act is Here Involved

The District Court held merely that since the McCarran-Ferguson Act allows the states to regulate the business of insurance, and to suspend thereby the operation of the Sherman Act, it follows that an insurance transaction negotiated, approved, administered, entered into and, to a large degree, formulated by a state is not subject to the Sherman Act.

This holding does not require determination of whether state *regulatory* legislation falling short of a "baby Sherman Act" is sufficient to suspend operation of the federal Act as to transactions between private parties. Determination of this question, which the petitioner alleges to be of significance in thirty-one states, is neither necessary nor desirable in this case.

Procurement by the State Employees Group Insurance Commission of the group insurance in issue was provided for by Chapter 32A of the Massachusetts General Laws (Petitioner's Appendix A, pp. 35-42).*

*The Commission was required to report annually to the Governor and Legislature. G.L. (Ter. Ed.) c. 32A, § 3. Its members consist of the Massachusetts Insurance Commissioner, the Commissioner of Administration, and three appointees by the Governor with the advice and consent of the Council. G.L. (Ter. Ed.) c. 32A, §3. The Commission was invested with authority to adopt such reasonable rules and regulations as necessary to administer the Act. G.L. (Ter. Ed.) c. 32A, §3. Detailed specifications relating to the insurance were provided.

The Commission was required to purchase the insurance "on such terms as it deems to be in the best interests of the Commonwealth and its employees." G.L. (Ter. Ed.) c. 32A § 4. In the absence of any contrary allegations in the complaint, the members of the Commission must be presumed to have carried out their statutory duty properly and in good faith in all respects. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 4, 14, 15 (1926). *Floyd* v. *Gage*, 192 F. 2d 137, 139 (4th Cir. 1951).

Every aspect of the purchase of this insurance was controlled by the state. Since one of the Commission members was the Commissioner of Insurance, all the activities here complained of were known to and approved by the official responsible for regulating the business of insurance in Massachusetts and for preventing unfair competitive practices therein. G.L. (Ter. Ed.) 176D (Appendix A to the Petition, pp. 42-45); see also c. 175 and c. 175A.

The following language from the House Report accompanying the draft McCarran-Ferguson Act, cited by the petitioner on page 17 of the Petition, is much in point here:

> "It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts."

Here, the Commonwealth of Massachusetts not only *permitted* the agreement or contract in question—it was a party to it.

As a further basis for its decision, the District Court makes passing reference to various regulatory statutes in Massachusetts. See especially G.L. (Ter. Ed.) c. 176D (Appendix A to the Petition, p. 42-45). These lend added support to its opinion. But such regulatory statutes of general application are not essential to the District Court's holding. Having been negotiated, approved, entered into and, to a large degree, formulated by the state itself, this transaction was *a fortiori*, and at very least, "regulated" by the state.

Construction of the McCarran-Ferguson Act in this case is narrowly limited to a unique factual situation involving the possible anti-trust aspects of a state's own purchase of insurance. Such purchases are insignificant relative to the insurance business as a whole or the national economy, and the dearth of reported cases indicates a virtual absence of anti-trust problems relative thereto. No useful purpose would be served by grant of *certiorari*.

## II.

### Independently of the McCarran-Ferguson Act, the District Court Properly Dismissed the Complaint Under this Court's Decision in "Parker v. Brown"

The holding in *Parker* v. *Brown*, 317 U.S. 340, 350-51 (1942) that Section 1 of the Sherman Act is not "intended to restrain state action or official action directed by the state" is a further clear ground for dismissal relied upon by the District Court.

The activities alleged here were directed and initiated by a state commission acting within its authority. The negotiation and execution of the insurance contract con-

stituted state action, on account of which neither the defendant state officials nor the defendant companies and their officers can be held to have violated the Sherman Act.

The petitioner asserts, without basis, that *Parker* v. *Brown, supra*, does not apply since the members of the Commission somehow exceeded their statutory authority (Petition, p. 33). However, there are no facts alleged in the complaint to upset the presumption that the members of the Commission performed their statutory duties faithfully. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14, 15 (1926). To the contrary, it appears that the Commission members insisted upon obtaining the lowest rates and the most favorable contract, and in no way exceeded or failed to carry out their statutory powers and duties. It is not alleged that any Commissioner acted selfishly or from private considerations.*

The cases cited by the petitioner concern actions by state officials going patently beyond the scope of their authority, and are irrelevant here.

*Parker* v. *Brown, supra*, is controlling, and was correctly applied by the District Court.

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* As was said in *Floyd* v. *Gage*, 192 F. 2d 137 at 139 (4th Cir. 1951),

"The defendants are officers of the State of North Carolina presumably discharging their official duty when acting upon matters properly coming within its scope. While their official status will not protect them from liability for violation of the federal statutes, something more is required to bring them in to answer for such violation than mere general charges of conspiracy and combination and abuse of official duty without allegation of any facts showing that unlawful combination or conspiracy in fact existed or that official duty had been transcended or abused thereby."

## III.

### Dismissal of the Complaint on the Ground that the Petitioner's Alleged Injury was Speculative and Remote was Correct, and Involves No Significant Question for this Court to Consider

A further independent ground for dismissal relied upon by the District Court is that the petitioner's alleged injuries were too indirect and speculative to permit him to recover under 15 U.S.C. § 15 (Petition, p. 3).

The petitioner asserts that the District Court's opinion stems from a line of authority which conflicts with contrary holdings in other circuits. This conflict is said to arise from a difference of opinion as to the degree of directness of injury to business or property which a plaintiff must have sustained in order to maintain an action for treble damages.

None of the cases cited in the Petition, however, are remotely similar on their facts to this one. For example, in *Congress Building Corp.* v. *Loew's, Inc.*, 1957 Trade Cases ¶ 68, 725 (7th Cir.), the question was whether a non-operating landlord of a motion picture house which was entitled under its *written lease* to a percentage of the lessee's gross receipts could sue for damages arising from a conspiracy directed against the lessee. The 7th Circuit held that it could. But that case in no way conflicts with the District Court's decision here. The defect here is not so much that any interest which the petitioner has in the alleged violation of the anti-trust laws is indirect. Rather it is that he fails to set forth facts showing the existence of any interest at all.

It is entirely conjectural whether or not, but for the defendants' conduct, the Minnesota company represented by the petitioner would have got the award.

There were eighteen other bidders. Where government officers have, as here, the duty to select "the contract most advantageous to the government, . . . advantage is not measured exclusively in terms of price; it includes other factors such as judgment, skill, ability, capacity, and integrity." *Friedl v. Lee*, 221 F. 2d 96, 100 (D.C. Cir. 1955). *O'Brien v. Carney, et al.*, 6 F. Supp. 761, 762 (D. Mass. 1934). *A. J. Goodman & Son v. United Lacquer Mfg. Co.*, 81 F. Supp. 890, 893 (D. Mass. 1949). The proximity of the insurer's home office, the reputation of the insurer, and the availability of servicing facilities in Massachusetts were factors to be weighed along with price. A governmental agency's discretion in awarding a contract is controlling and is not subject to judicial review. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125-128 (1940). *O'Brien v. Carney, et al.*, 6 F. Supp. 761, 762 (D. Mass. 1934). The Massachusetts Commission, for reasons sufficient to itself, could have selected any one of the eighteen other bidders. Only by improperly substituting its own determination in place of that conferred by law upon the Commission could a court reach the conclusion that Minnesota Mutual, rather than another bidder, would have obtained the award.

Moreover, it is not clear from the complaint that the petitioner had any legal right to compensation from Minnesota Mutual. "Injury implies violation of a legal right." *Keogh v. Chicago & Northwestern Railway Company*, 260 U.S. 156, 163 (1922). In paragraph 23 of the complaint the petitioner alleges generally that he was deprived of compensation for "servicing" the state employees' contract and of "commissions and service fees for *new business* which would have resulted had said contract been awarded to Minnesota". (Emphasis supplied.) However, there is no reference in the com-

plaint to a contract between the petitioner and Minnesota Mutual relative to compensation for "servicing" the state employees' contract. The petitioner does not allege anywhere that he was to be awarded commissions by Minnesota Mutual.* As for servicing fees, neither the insured nor the insurer have a legal duty to place the servicing of a policy with the original broker in the absence of a contract to do so. See *Cronin* v. *National Shawmut Bank*, 306 Mass. 202.

That the petitioner was deprived of commissions and fees for *new business* is obviously conjectural. It relates to a mere hope. What, if any, new business would have been created is beyond anyone's power to predict.

It is stated in the Petition that the petitioner "is in the same position as the [a] sales agent." (Petition, p. 32). However, the complaint alleges that the petitioner was a broker. A broker is not necessarily an agent. For all that appears, the petitioner's efforts in behalf of Minnesota Mutual were entirely speculative and were undertaken purely in the hope that, if matters turned out right, some satisfactory arrangement for compensation could be arranged either with Minnesota Mutual or the Commonwealth. None of the cases cited in the Petition permit recovery where the relationship between the plaintiff and the party actually injured is so indefinite and obscure.

Determination of this point, in any event, turns on the particular facts of this case. A purported conflict between circuits in cases having to do with movie house leases and patent licenses is no basis for granting *certiorari* here.

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*In the group insurance field commissions usually go solely to the broker designated by the insured, who may or may not be the original broker.

## IV.

### The Complaint Fails to Allege Facts Amounting to a Violation of the Sherman Act

The District Court did not consider whether the defendants' activities amounted to a conspiracy in restraint of trade. For purposes of its opinion, the Court assumed the existence of such a conspiracy. The Court doubtless believed that the other available grounds of decision were so strong that there was no need to consider this question.

In point of fact, the complaint falls far short of alleging facts amounting to an illegal conspiracy or combination violative of the Sherman Act.* For this further reason *certiorari* should be denied. See *Langnes* v. *Green*, 282 U.S. 531, 535-539. *Walling* v. *General Industries Co.*, 330 U.S. 545, 547.

A private anti-trust suit is designed to further the public purposes of the anti-trust laws. This complaint fails to set forth any conduct whatever which could have resulted in economic harm to the public or any important segment thereof. See *Kinnear-Weed Corp.* v. *Humble*

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*General conclusionary allegations of a conspiracy to restrain trade, of unlawful acts, and of illegal purpose are not enough. *Lipson* v. *Socony Vacuum Corp.*, 76 F.2d 213 (1st Cir. 1935). A court will look to the specific acts averred to determine as a matter of law whether these, if proven, would constitute a violation of the Sherman Act. *Shotkin* v. *General Electric Co.*, 171 F.2d 236, 239 (10th Cir. 1948). *National Used Car Market Report, Inc.* v. *National Auto Dealers Ass'n.*, 108 F. Supp. 692 (D.C. 1951). *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885, 888 (4th Cir. 1934). Anti-trust litigation is notoriously protracted, and courts have recognized that it would be unfair to force defendants to trial on the basis of pleadings which do not indicate with reasonable clarity that the plaintiff has a case. *Baim & Blank, Inc.* v. *Warren-Connelly Co., Inc.* (S.D.N.Y. 1956) 1956 Trade Cases ¶ 68,285. *Abanof* v. *J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830, 834 (N.D. Cal. 1939).

*Oil & Refining Co.*, 214 F. 2d 891, 893 (5th Cir. 1954). *Fedderson Motors, Inc.* v. *Ward et al.*, 180 F. 2d 519, 522 (10th Cir. 1950).

None of the types of economic harm customarily associated with anti-trust violations are alleged. There was no increase in or fixing of insurance rates, no diminution in the volume of goods or services in competitive markets, no deterioration in the quality of goods or services, or other like evil consequence in the free flow of commerce. *Ape. Hosiery Co.* v. *Leader*, 310 U.S. 469, 493, 500-1 (1940). *Shotkin* v. *General Electric Co., supra.*

It is well established that individuals and entities may deal and trade with whom they please *unless* their conduct is part of a larger combination or conspiracy to restrain trade or monopolize a market. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). *Federal Trade Commission* v. *Raymond Co.*, 263 U.S. 565, 573 (1924).

Isolated instances of harm, or harm to the plaintiff alone, do not permit the maintenance of an action under Section 4 of the Clayton Act.* The restraint upon competition resulting from an individual plaintiff's loss of a single contract is too slight. *Ruddy Brook Clothes, Inc.* v. *British & Foreign Marine Ins. Co.*, 195 F. 2d 86, 90 (7th Cir. 1952). *Silverman* v. *Seifrid, et als* (N.D., Ill.) 1950-51 Trade Cases, ¶62,874.

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*Blue Bell Co.* v. *Frontier Refining Co.*, 213 F.2d 354 (10th Cir. 1954). *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268 (5th Cir. 1954). *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951). *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885 (4th Cir. 1934). *Interborough News Co.* v. *Curtis Pub. Co.*, 127 F. Supp. 289 (S.D.N.Y. 1954). *Riedley* v. *Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D.Ky. 1949). *Camfield Mfg. Co.* v. *McGraw Elec. Co.*, 70 F. Supp. 477 (D.Del. 1947). *Sorrentino* v. *Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E.D.Pa. 1942). *Arthur* v. *Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (D.Md. 1937).

As was said in *Schwing Motor Company* v. *Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md. 1956) aff'd. *per curiam* 239 F. 2d 176, at 904,

> "one of the grounds of decision in the Apex case: [*Apex Hosiery Co.* v. *Leader*, *supra*.] was that the public was not injured by the fact that 1,000 dozen pairs of Apex stockings failed to move in interstate commerce, because the conspiracy had no effect on the market of the general commodity, and did not give the conspiring group the power to fix prices, restrict production, or lessen quality with impunity, inasmuch as the general market remained in its normal competitive state. So, in the case at bar, the public was not injured by the alleged fact that 357 Hudson automobiles failed to move in interstate commerce, since the market in the general commodity, automobiles in all price ranges, remained in its normal competitive state."

Nothing in the complaint even remotely suggests that the normal competitive state of the insurance market was affected by the defendants' alleged conduct.

The allegations that the conspiracy sought to eliminate Minnesota Mutual as a competitor and discourage it from continuing to solicit business in Massachusetts (Complaint, Pars. 14, 15, A. 14, 15), and that the defendants "knew that if the contract was awarded to Minnesota it would carry with it considerable prestige and result in Minnesota acquiring considerable new business in Massachusetts and elsewhere (Complaint, Par. 22, A. 19), are mere conclusions. Minnesota Mutual is not a party here. The awarding of the state employees' business to other insurers under the circumstances alleged does not show a design to injure Minnesota Mutual. That the loss of a single group insurance contract would "discourage" Minnesota Mutual is a

virtual absurdity. The plaintiff fails to spell out any of the economic facts relevant to such assertion, such as Minnesota Mutual's size in relation to a particular market.

The plaintiff sets forth no facts showing that the conduct alleged had or could have had any appreciable effect whatever on the flow of interstate commerce.

No purpose would be served by a grant of certiorari where it is plain, as it is here, that the complaint, on the basis of entirely familiar principles of law, fails to set forth a cause of action.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 5, 1957

## APPENDIX

MASSACHUSETTS GENERAL LAWS (Ter. Ed.) Chapter 175, §§54(c); 47 (Sixth)

§54. No domestic mutual company shall transact any other kind of business than is specified in its charter or agreement of association, except that it may in addition transact the kinds of business specified below by reference to the several clauses of section forty-seven, as follows: . . .

(c) The sixth, excepting subdivision (e) thereof, if authorized to transact life insurance, whether or not it has a capital stock, provided it has net cash over all liabilities, computed on the basis fixed by sections nine to twelve, inclusive, of not less than four hundred thousand dollars.

§47 . . . .

Sixth, to insure (a) any person against bodily injury or death by accident, or . . . (d) to make insurance upon the health of individuals. . . .

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No. 256

# In the Supreme Court of the United States.

OCTOBER TERM, 1957.

J. THOMAS MILEY,
*Petitioner,*
*v.*
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR RESPONDENTS COLUMBIAN NATIONAL LIFE INSURANCE COMPANY AND LOYAL PROTECTIVE LIFE INSURANCE COMPANY, IN OPPOSITION.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 1156.

J. THOMAS MILEY,
*Petitioner,*

*v.*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR RESPONDENTS COLUMBIAN NATIONAL LIFE INSURANCE COMPANY AND LOYAL PROTECTIVE LIFE INSURANCE COMPANY IN OPPOSITION.

### Opinion Below.

The opinion of the District Court is reported at 145 F. Supp. 299. It also appears in the record at pp. A28-A33.

The per curiam affirmance by the Court of Appeals for the First Circuit is reported at 242 F. (2d) 758. It is printed at p. A36 of the record.

## Jurisdiction.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1).

## Question Presented.

Has a claim for treble damages under the Sherman Act been stated where the complaint is brought against the members of the Massachusetts State Employees' Group Insurance Commission, certain domestic insurance companies and their officers by an insurance broker who alleges a loss of servicing fees or commissions due to a conspiracy among the defendants, because the Commission awarded a group insurance contract with the Commonwealth of Massachusetts to a defendant domestic insurance company on terms equal to that previously submitted by plaintiff upon behalf of a foreign insurance company although this Commission had been created to obtain such insurance by a special Massachusetts statute and had been empowered to "negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees"? (See Massachusetts G.L. (Ter. Ed.) c. 32A, sec. 4.)

## Statutes Involved.

The statutes involved are adequately set forth in the petition at pp. 3-4, and Appendix A of the petition, pp. 35-45.

## Statement.

Due to the argumentative interpolations of the statement in the petition, it seems appropriate to resummarize the allegations of the complaint as follows:

By November 16, 1955, the individual defendants, Fabisak, Humphreys, Gooch, Deely and Sheridan, were appointed as a State Employees' Group Insurance Commission under chapter 628 of the Acts of 1955 of the Commonwealth of Massachusetts (R. p. A9).

The Commission thereupon published "An Invitation to All Insurance Companies Licensed To Do Business in Massachusetts," which invited bids or proposals for group life, accidental death and dismemberment insurance, and group hospital, surgical and medical coverage for employees of the Commonwealth in accordance with specifications established by the Commission (R. p. A10).

The plaintiff, an insurance broker, worked out and submitted a joint bid by Minnesota Mutual Life Insurance Company (hereinafter called "Minnesota"), a Minnesota insurance company licensed to do business in Massachusetts, Massachusetts Hospital Service, Inc. (Blue Cross) and Massachusetts Medical Service (Blue Shield). This proposal offered greater benefits for a three-year contract term than were offered by any of the other insurance companies which submitted proposals by December 1, 1955 (R. pp. A10-R12).

The defendant members of the Commission ascertained that Blue Cross and Blue Shield would provide the same medical, surgical and hospital coverage included in its offer with Minnesota in combination with any other insurance company offering a rate as low as Minnesota (R. p. A14).

The defendants (except Boston) thereupon entered into a combination and conspiracy to equal or better Minne-

sota's offer and deprive Minnesota of the contract. The defendant insurance companies then in the combination could not offer a rate below $1.20 per month per thousand without violating their right to do business in New York. The defendant Boston, which did not do business in New York, was then brought into the combination and submitted an offer of 90 cents per month per thousand dollars, the same as Minnesota's rate (R. pp. A15-A17).

The Commission awarded the contract to Boston, which thereupon allotted 95% of the insurance to the other defendant companies by way of reinsurance (R. p. A18).

As a result of this combination or conspiracy, Minnesota failed to receive the award, and the plaintiff was thereby deprived of compensation he would have received for servicing the contract and of commissions and service fees for new business which would have resulted had the contract been awarded to Minnesota (R. p. A19).

The District Court allowed defendants' several motions to dismiss the complaint and ordered the complaint dismissed. In its decision the Court pointed out that what had been done occurred in the course of negotiations authorized by a special Massachusetts statute (Massachusetts G.L. (Ter. Ed.) c. 32A) which gave the Commission "broad discretion to purchase insurance on such terms as it deemed to be in the best interest of the Commonwealth and its employees," and further, that Massachusetts in response to the intent of Congress in the McCarran-Ferguson Act, 15 U.S.C., §§ 1011-1015, had enacted Massachusetts G.L. (Ter. Ed.) c. 176D in complete "regulation of trade practices in the business of insurance" in Massachusetts, and hence the Sherman Act had no application (R. pp. A30-A31).

In addition, the Court asserted that plaintiff had not set forth any legal injury to his business or property, stating in the course of its discussion of this point that "The com-

mission was not required to award the contract to Minnesota on the basis of its low bid. It was clearly free to negotiate with other companies to get an equally low offer from some competitor" (R. p. A31).

Finally the District Court stated that as to the five commission members the action was, in effect, an action against the state over which "the jurisdiction of this court, in the absence of any waiver by the state of its immunity, does not extend" (R. p. A33).

The United States Court of Appeals for the First Circuit affirmed the District Court decision per curiam (R. p. A36).

## Argument.

It is manifest that there is no occasion for further review by this Court, for the record discloses none of the normal grounds for granting a writ of certiorari.

### I.

### The Decision Below That the Sherman Act Had No Application to the Award of This State Insurance Contract, and That Plaintiff Failed to Set Forth A Legal Injury to His Business or Property Is Clearly Correct.

The cause, as recognized by the Courts below, involves a very narrow, peculiarly local issue, namely, the awarding of an insurance contract by the Commonwealth of Massachusetts under a special statute, Massachusetts G.L. (Ter. Ed.) c. 32A.

The Commonwealth was not entering into the insurance business. It was purchasing insurance for itself and its employees.

Thus the transaction obviously was regulated by the statute which created the Commission and authorized it to

"negotiate with and purchase" such insurance "on such terms as it deems to be in the best interest of the commonwealth and its employees . . ." (Appendix A of petition, p. 38).

If for no other reason, accordingly, the transaction was not within the contemplation of the Sherman Act. The matter was a special, unique situation regulated by a special statute governing the very award of this insurance business.

In addition the Commonwealth of Massachusetts had expressly enacted General Laws (Ter. Ed.) c. 176D as a general insurance business regulation in response to the invitation of the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015).

Section 1 of said chapter 176D (as inserted by Acts of 1947, c. 659) provides:

> "The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, *all such practices* in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Emphasis supplied.) (Appendix A of petition, p. 42.)

The insurance business involved, having thus been completely "regulated" by the Commonwealth of Massachusetts, the transaction was exempt from the Sherman Act.

Petitioner's elaborate argument (petition, pp. 12-29), in essence, attempts to assert that the words of the McCarran-Ferguson Act "to the extent that such business is not

regulated by State law" should be construed as though they contained the additional provision "and to the extent that such state law does not provide the same remedies as the foregoing acts."

No such requirement can be read into the plain wording of the Act.

Indeed, although petitioner resorts to the legislative history of the Act, he is unable to quote any congressman or senator who stated that he intended any such additional requisite.

Petitioner is, of course, aware that, if what is alleged was improper, he or Minnesota could have sought to quash the award (*Gifford* v. *Commissioner of Public Health*, 328 Mass. 608), or sought to enjoin the award under chapter 176D, section 9 (Appendix to petition, pp. 43-44).

His contention, however, is that Massachusetts did not give him any right to sue for treble damages, and therefore he had a right to sue in the Federal Court under the Sherman Act, although Massachusetts had otherwise completely "regulated" this transaction.

The circumstances of this cause clearly warranted the denial of any such right by the District and Circuit Courts.

Moreover, under the unique facts of this case it is manifest that petitioner suffered no legal injury to his business or property.

"Injury implies violation of a legal right." *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156, 163.

Obviously, plaintiff's rights could rise no higher than his principal's, Minnesota.

Minnesota failed to obtain the award because, according to the allegations, the awarding authority conferred and combined with other defendants to obtain as good or a better bid from a Massachusetts company under a statute which gave it the right to "negotiate with and purchase, on such terms as it deems to be in the best interest of the

commonwealth and its employees." (Appendix to petition, p. 38).

It has long been decided that an unsuccessful bidder for a governmental contract has no standing to claim a legal injury dependent upon a bidding statute.

*Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126-128:

> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.
>
> "... That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of *litigable rights upon those desirous of selling to the Government;* it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain."

Manifestly, if Minnesota suffered no legal injury, the plaintiff's alleged injuries were not legal injuries within the Act but were, as the District Court said, "remote and speculative" (R. p. A31).

## II.

### The Asserted Conflict with Decisions of Courts of Appeal for Other Circuits Does Not Exist.

Despite the instant cause being manifestly factually unique, the petitioner seizes upon the District Court's

statement that "The injuries set forth thus seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. 15. *Melrose Realty Co., Inc. v. Loew's, Inc.*, 234 F. 2d 518; *Productive Inventions Inc. v. Trico Products Corp.*, 224 F. 2d 678" (R. p. A32), as creating a direct conflict in decisions with the Seventh Circuit in *Roseland v. Phister Mfg. Co.*, 125 F. (2d) 417, and *Congress Building Corp. v. Loew's Inc.*, 1957 (C.C.H.) Trade Cases, par. 68,725, and the Ninth Circuit in *Steiner v. 20th Century-Fox Film Corp.*, 232 F. (2d) 190 (Petition, pp. 29-31).

It seems incomprehensible how the petitioner could baldly assert a conflict of decision with the instant case on the basis of the above citations in view of their dissimilar facts and of statements contained in these very cases. The most that could be asserted would be that the Court in *Congress Building Corp. v. Loew's Inc.*, 1957 (C.C.H.) Trade Cases, par. 68,725, refused to follow the rationale of the decisions in *Melrose Realty Co., Inc., v. Loew's, Inc.*, 234 F. (2d) 518, and *Productive Inventions, Inc., v. Trico Products Corp.*, 224 F. (2d) 678 (both of which relied upon *Harrison v. Paramount Pictures*, 115 F. Supp. 312, 211 F. (2d) 405).

It should be sufficient, therefore, to make the following observations to indicate factual differences and lack of conflict.

*Roseland v. Phister Mfg. Co.*, 125 F. (2d) 417, involved a direct injury to an exclusive sales agent when his employer combined with others to suppress competition and restrict his sales territory.

*Steiner v. 20th Century-Fox Film Corp.*, 232 F. (2d) 190, involved a theatre lessor's complaint that defendants had combined with its lessees to force favorable concessions to the lessees. To the contrary of what petitioner asserts at page 31 of the petition, the Court expressly distinguishes

*Harrison* v. *Paramount Pictures*, 115 F. Supp. 312, 211 F. (2d) 405, stating at p. 193: "The cases cited by the appellees are not factually similar to the case at bar."

*Congress Building Corp.* v. *Loew's, Inc.*, 1957 (C.C.H.) Trade Cases, par. 68,725. (7th Cir. May 31, 1957) involved a theatre lessor's complaint against its lessee and others for suppressing competition. In allowing recovery the Court does refuse to follow the rationale of no recovery for remoteness adopted in *Harrison* v. *Paramount Pictures*, 115 F. Supp. 312, 211 F. (2d) 405 (a theatre lessor case) and followed in *Melrose Realty Co.* v. *Loew's, Inc.*, 234 F. (2d) 518 (theatre lessor), and *Productive Inventions, Inc.*, v. *Trico Products Corp.*, 224 F. (2d) 678 (involving a patent licensor's complaint). In the course of its discussion, however, the Court at par. 72,959 refers to "factually dissimilar situations" and includes therein *Productive Inventions, Inc.*, v. *Trico Products Corp.*, 224 F. (2d) 678, the instant case, and *Snow Crest Beverages, Inc.*, v. *Recipe Foods, Inc.*, 147 F. Supp. 407 (cited in petition at p. 30).

Moreover, it should be noted that this Court has already denied certiorari in *Melrose Realty Co., Inc.*, v. *Loew's, Inc.*, 352 U.S. 890, and *Productive Inventions, Inc.*, v. *Trico Products Corp.*, 350 U.S. 936.

The asserted conflict in decisions does not in truth exist and there is not that ". . . real and embarrassing conflict of opinion and authority between the circuit courts of appeal" (*Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393), which alone justifies certiorari.

Rather the attempt to assert a conflict arises from "differences in states of fact" for which a writ of certiorari has often been dismissed as improvidently granted.

See *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813.

## III.

### There is No Substantial Question of Federal Law.

The petitioner attempts to convert the unique facts of the cause into a broad federal question by references to the "giant insurance industry" and an asserted resultant necessity of an elastic interpretation of the McCarran-Ferguson Act by this Court for the protection of the public (Petition at pp. 12 and 13).

It is apparent that no such broad ". . . principles the settlement of which is of importance to the public as distinguished from that of the parties . . ." (*Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393) stem from the instant cause.

It involves a local, isolated incident, namely, the award of an insurance contract by the Commonwealth of Massachusetts.

As the lower courts recognized, the awarding of that contract was completely "regulated" by Massachusetts, and the Sherman Act had no application to the facts.

Although the Court did not find it necessary to discuss the point in its decision, it is obvious that the transaction alleged did not show injury to the public or substantial effect upon interstate commerce. On the contrary, the alleged purpose of the combination of defendants was for "meeting or bettering" the low bid of Minnesota (R. pp. A15-A16). Not harm but benefit to the public was contemplated if the Commonwealth and its employees may be deemed the public.

In essence this case involves a simple intrastate transaction with no such important federal ramifications as asserted by petitioner. Its factual situation renders the cause unique and hardly an authority for the dire assertion by petitioner that "As a result citizens of thirty-two of the forty-eight states are without any relief whatever

from violations of the Sherman Act in the insurance business: they are at the mercy of the giant insurance industry" (Petition, pp. 12-13). Application for certiorari by hyperbole ought not be countenanced.

In truth, this cause was solely a Massachusetts problem. To have upheld this complaint would have constituted an indirect repudiation of an award of an insurance contract by the Commonwealth of Massachusetts. Such action, in effect, where no state court or administrative proceeding had been brought to quash or invalidate the award, would have constituted an interference with the sovereign acts of the Commonwealth.

See *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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